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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 331

RUDY E. CALLEN, PETITIONER,

vs.

PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1947.

CERTIORARI GRANTED OCTOBER 27, 1947.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

No. 9263.

RUDY E. CALLEN

v.

PENNSYLVANIA RAILROAD COMPANY,
Appellant.

Appeal From the Judgment and Final Order of the District Court of the United States for the Eastern District of Pennsylvania.
(Civil Action No. 4763)

APPENDIX FOR APPELLANT.

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RELEVANT DOCKET ENTRIES.

May 14, 1945.	Complaint, filed.
May 14, 1945.	Summons exit.
May 14, 1945.	Plaintiff's demand for jury trial, filed.
May 26, 1945.	Appearance of Philip Price, Esq. for defendant, filed.
June 1, 1945.	Summons returned: "on May 18, 1945 served" and filed.
June 12, 1945.	Orde of Court with Plaintiff's consent thereto, granting permission for filing answer nunc pro tunc, filed.
June 12, 1945.	Answer, filed.
July 19, 1945.	Order to place case on next trial list, filed.
Oct. 5, 1945.	Motion by plaintiff for production of medical reports, filed.
Oct. 5, 1945.	Order to place case on the Argument List, filed.
Oct. 18, 1945.	Defendant's Answer to Motion to produce medical reports, filed.
Oct. 23, 1945.	Hearing sur motion for production of medical reports. C. A. V.
Jan. 25, 1946.	Opinion, Bard, J., denying motion for production of documents, filed.
Apr. 8, 1946.	Plaintiff's motion for production of records, filed.
Apr. 12, 1946.	Answer to plaintiff's motion for production of records, filed.

Apr. 25, 1946.	Argued sur motion for production of documents. C. A. V.
May 21, 1946.	Jury called and sworn.
May 22, 1946.	Trial—witnesses sworn.
May 23, 1946.	Trial resumed.
May 27, 1946.	Trial resumed.
May 28, 1946.	Trial resumed.
May 28, 1946.	Verdict in favor of plaintiff in sum of $24,990.
May 28, 1946.	Judgment in favor of plaintiff in sum of $24,990. and costs, filed. 5/29/46 Noted and notice mailed.
May 28, 1946.	Defendants' motion for a directed verdict, filed.
May 31, 1946.	Defendant's motion to set aside verdict and judgment in accordance with motion for directed verdict, filed.
June 6, 1946.	Defendant's motion for new trial, filed.
June 18, 1946.	Order of Court directing U. S. Marshal to furnish meals to jurors, filed.
July 1, 1946.	Plaintiff's points for charge, filed.
July 1, 1946.	Defendant's points for charge, filed.
July 1, 1946.	Testimony, filed. (2 vol.).
Sept. 13, 1946.	Order to place case on Argument List, filed.
Sept. 30, 1946.	Argued sur motion to set aside verdict and judgment, and motion for new trial.
Oct. 21, 1946.	Opinion, Welsh, J., denying motion to set aside verdict etc. and motion for new trial, filed.

Oct. 28, 1946. Order of Court denying motions to set aside verdict and judgment and for a new trial, filed. 10/28/46 Notes & notice mailed.

Oct. 28, 1946. Defendant's Notice of Appeal, filed.

Oct. 28, 1946. Copy of Clerk's notice to U. S. Circuit Court of Appeals, filed.

Oct. 28, 1946. Defendant's Supersedeas Bond on Appeal in $35,000. with U. S. Guarantee Co., as surety, filed.

Nov. 18, 1946. Statement of Points on which appellant intends to rely, filed.

Nov. 18, 1946. Stipulation of counsel waiving filing of defendant's copy of reporter's transcript, filed.

Nov. 18, 1946. Appellant's designation of contents of record on appeal, filed.

Nov. 27, 1946. Order of Court extending time for filing record on appeal to Jan. 7, 1947, filed. 11/29/46 Noted.

COMPLAINT.

(Filed May 14, 1945.)

The plaintiff is Rudy E. Callen, a resident of New Brighton, Pennsylvania, and he herewith asks the sum of seventy-five thousand dollars ($75,000), upon a cause of action whereof the following is a statement:

1. This action arises under the Act of Congress, April 22, 1908, c. 149; 35 Stat. 65, and Amendments thereto, U. S. C. A., Title 45 sec. 51 et seq., and further amended by the Act of Congress approved by the President of the United States on August 11, 1939, Chapter 685—1st Session of the 76th Congress, known and cited as "The Federal Employers' Liability Act", and under the Safety Appliance Acts, Title 45 U. S. C. A., Sec. 1-23, inclusive.

2. That at all times herein mentioned the Pennsylvania Railroad Company was, and now is, a railroad corporation duly organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania.

3. That at the time and place herein mentioned in paragraph "3", and for a long time prior thereto, the defendant as a common carrier operated, by electric and steam power, trains carrying passengers, freight, express packages, baggage, foreign and domestic mail in commerce between the different States of the United States and its Territories.

4. That at the time and place herein mentioned, the plaintiff and the defendant were ~~en~~gaged in interstate commerce between the different States of the United States and its Territories.

5. On or about December 14, 1944, the plaintiff herein was employed by the defendant as a brakeman on a train running from Toledo, Ohio, to Conway, Pennsylvania, and when in Tiro, Ohio, at about 9 A. M. the plaintiff, due to the negligence of the defendant, its agents, servants or

employees, was thrown from or forced to jump from the engine to the ground, as a result of which he suffered severe, painful and permanent injury.

6. At the time and place aforementioned, the said agents, servants or employees of the defendant who were responsible for the accident aforementioned, were acting in the scope and course of their employment with, and under the direct and exclusive control of the defendant.

7. The negligence of the defendant, by its agents, servants or employees, consists of the following:

(a) Failure to provide a safe place to work;

(b) In that the engineer of the said train, despite a slow-up signal being given to him as the engine was moving backward to couple to a draft of cars did fail to slow up the engine, knowing that the plaintiff was riding the side stirrups of the engine from which he was passing signals to the engine crew, and that the failure to make a careful, slow and moderate impact would result in the plaintiff being thrown with great force and violence from the said position on the engine, whereupon the plaintiff was obliged to jump from the engine to protect himself;

(c) Violating the rules of the company in regard to the movement of engines under the circumstances;

(d) Violating the rules of the Interstate Commerce Commission in regard to the maintenance and condition of freight cars in respect to their couplings and brakes promulgated under and by authority of the Safety Appliance Acts;

(e) Failure to regard the safety of the plaintiff under the circumstances;

(f) Negligent at law.

8. As a result of the accident aforementioned the plaintiff was unable to attend to his usual and daily duties and occupations, as a result of which he has suffered great

loss of earnings and earning capacity and will continue to do so for an indefinite time in the future.

9. Because of the accident aforementioned the plaintiff has suffered severe, painful and permanent injury to his back, its muscles, bones, spine, cartilaginous tissue and the nerves in the spinal canal and elsewhere in the back; permanent loss of function and use of the back; subluxation and strain of the sacroiliac; and permanent injury to his nerves and nervous system.

10. Because of the accident aforementioned, the plaintiff has been obliged to, and will continue to be obliged to expend various and divers sums of money for medicine and medical attention for an indefinite time in the future, to his great detriment and loss.

11. As a result of the accident aforementioned, the plaintiff herein has endured great pain, agony and physical and mental anguish, and will continue to suffer so for an indefinite time in the future, to his great detriment and loss.

WHEREFORE the plaintiff demands judgment against the defendant in the sum of seventy-five thousand dollars ($75,000), together with the costs of this action.

Respectfully submitted,

/s/ B. NATHANIEL RICHTER,
/s/ EDWARD J. GRIFFITHS,
Attorneys for Plaintiff.

ANSWER TO COMPLAINT.

(Filed June 12, 1945.)

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Defendant admits that on or about December 14, 1945, the Plaintiff was employed by the Defendant as averred but denies that the Plaintiff was thrown from or forced to jump from the said engine by reason of any negligence on the part of the Defendant, its agents, servants or employees and further denies that the injuries alleged to have been received were the result of any such negligence.

6. Defendant is unable to either admit or deny the averments of Paragraph 6 that the agents, servants, or employees of the Defendant were acting within the scope and course of their employment as the said agents, servants or employees are not identified. Defendant denies, however, that any of its agents, servants or employees were responsible for the said accident.

7. Defendant denies that it by its agents, servants or employees was negligent in any of the respects averred in Paragraph 7 of the Complaint or in any other respect whatsoever.

8. Defendant has no knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 8 of the Complaint.

9. Defendant has no knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 9 of the Complaint.

10. Defendant has no knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 10 of the Complaint.

11. Defendant has no knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 11 of the Complaint.

12. Defendant as a further defense to the said Complaint avers that on or about February 14, 1945, the Plaintiff for a good and valuable consideration duly executed and delivered to Defendant a full and complete release of any and all claims which he then had and might have against the Defendant by reason of the said alleged injuries.

/s/ PHILIP PRICE,
Attorney for Defendant.

[1]

TESTIMONY.

Philadelphia, Pa., May 31, 1946.

Before Hon. George A. Welsh, *J.*, and a Jury.

Present: B. Nathaniel Richter, Esq., and Joseph S. Lord, 3d, Esq., for the Plaintiff.
Philip Price, Esq., and Scott Seddon, Esq., for the Defendant.

(At 2:45 P. M. a jury was duly sworn.)

The Court: Mr. Lord, are you and Mr. Richter going to participate in presenting the plaintiff's case, or will one of you take charge entirely?

Mr. Richter: I will take charge.

[2] The Court: Mr. Price, will you take charge? You will be senior deacon?

Mr. Price: That is right. I don't know about the dignity. It may be just because I am old and can't help it.

The Court: This case is one in which Rudy E. Callen is plaintiff, and the defendant is Pennsylvania Railroad Company. The plaintiff is represented by Mr. Lord and by Mr. Richter, who sit at this table here. Mr. Richter is the gentleman nearest you. He says he is going to conduct the plaintiff's case in conjunction with his associate, in an advisory capacity; and Mr. Price, Philip Price, will conduct the case for the Pennsylvania Railroad in person.

You will hear considerable from these young men as the trial proceeds. However, we have a matter for conference at side bar, before you come in, and in view of that situation we feel that it might be to the best interest of all to continue the case until tomorrow morning at ten o'clock. We will then present the case to you without any break in the testimony.

After you go, it may be that the Court will want to ask these young men something about procedure that will be followed, leading to any possible saving of time, without haste, of course, so that when you come back tomorrow [3] morning you will have an opportunity to have an unbroken story of the case from both sides; then after that, at the proper time, you will be given the responsibility of passing upon what is what.

You are excused until tomorrow morning at ten o'clock. Court is not adjourned. You will remember the number at which you sit. It is not likely that anybody will talk about the case to you, but if anybody should, do not let him.

(The jury was excused at 2:50 P. M.)

THE COURT: Gentlemen, is there anything in the way of procedure that we should discuss, whether you think everything is in readiness to go ahead in the usual way? Is there any documentary evidence that we may stipulate?

MR. PRICE: I think not. I think this will go on with reasonable expedition and with no undue complications that we can perceive.

THE COURT: All right then, tomorrow morning at ten o'clock. You will have your points of charge, will you, for me, before the conclusion of the case—both sides?

MR. PRICE: Yes, sir.

THE COURT: Will Mr. Price and Mr. Richter come here a minute?

[3a] (There was a conference at side bar followed at 3 o'clock P. M. by adjournment until Wednesday, May 22, 1946, at 10 o'clock A. M.)

SECOND DAY.

[4] Philadelphia, Pa., May 22, 1946.

Before HONORABLE GEORGE A. WELSH, *J.*, and a Jury.

Present: B. NATHANIEL RICHTER, ESQ., and JOSEPH S. LORD, 3D., ESQ., for the Plaintiff.
PHILIP PRICE, ESQ., and SCOTT SEDDON, ESQ., for the Defendant.

THE COURT: Are you ready, gentlemen?

May I ask you something here at side bar, please. I wonder if we could have it understood that if the [5] railroad strike and railroad traffic is interrupted that we should recess the case until, say, a reasonable time. Here is Mr. Richter now.

(Mr. Richter enters the court room.)

THE COURT: I was just saying, there was some doubt as to the railroad situation that might prevail after tomorrow, and if we start this case I was wondering if we could have a stipulation that we could recess it until the resumption of railroad traffic next week, and if it is still uncertain after that we might have to withdraw a juror. But, we are all here ready to try the case and I didn't want to lose the opportunity to try it—and both sides are busy, I know,—and if we can just hold it in such a situation that we can meet the crisis, why, I will be glad to start it.

Is that all right with you?

MR. RICHTER: That is all right.

MR. PRICE: That is all right with me, Your Honor.

THE COURT: All right, we will just coast along and see how we get on. Whenever you are ready, Mr. Richter.

MR. RICHTER: I am, sir.

(Opening statement to the jury on behalf of the plaintiff by Mr. Richter.)

[6] MR. RICHTER: May we have about five minutes' recess? I just want to check with Beaver Falls, Pennsylvania. Dr. Sheets had an emergency operation on Monday, and I would appreciate it if we could have about a five minute recess until I call him.

THE COURT: We will take a recess for five minutes, members of the jury, please. Just relax.

(Informal recess.)

MR. RICHTER: Dr. Sheets will be here tomorrow morning, Your Honor, but I think we can go ahead in the meantime.

THE COURT: Very well.

MR. RICHTER: All right, take the stand, Mr. Callen.

THE COURT: The witness is ready to be sworn.

RUDY E. CALLEN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. RICHTER:

Q. Mr. Callen, you are the plaintiff in this case, are you not, sir?

A. I am.

Q. And how old are you?

[7] A. I will be 36 on the 29th of next month.

Q. Married?

A. Yes, sir.

Q. How many children do you have?

A. Three children.

Q. And where do you live, Mr. Callen?

A. New Brighton, Pennsylvania.

Q. On December 14, 1944, by whom were you employed?

A. By the Pennsylvania Railroad Company.

Q. In what capacity?

A. As brakeman.

Q. How long had you been employed by the railroad?

A. Since the 27th of April, 1942.

Q. Had you always been a brakeman?

A. No, I had several jobs; I had been promoted to conductor, and I was placed on this job as conductor, and then I went back to brakeman again.

Q. On this occasion, on December 14, 1944, were you working on the road crew?

A. That is right.

Q. Now, the road crew is distinguished from the yard crew,—the road crew takes the trains on to various destinations?

A. That is right.

THE COURT: What do you call that?

[8] MR. RICHTER: The road crew, Your Honor.

THE COURT: Road crew?

THE WITNESS: They go out on the road, the road crew.

THE COURT: Oh, the road crew.

MR. RICHTER: Yes, sir.

By MR. RICHTER:

Q. Now, when did you leave for that trip?

A. On the morning of the 14th.

Q. You were on your way from where to where?

A. I had gone from the Conway Yard to Toledo, and I was on the return on the 14th.

Q. On that trip was a Mr. Crum your conductor?

A. Yes, sir.

Q. On the way back tell us approximately how many cars you had a hold of?

A. I didn't have charge——

Q. How many cars were on your train?

A. I would say around 80.

Q. And you were coming back from Toledo, Ohio?

A. From Toledo, Ohio.

Q. To Conway, Pennsylvania?

A. That is right.

Q. Where is Conway, Pennsylvania?

[9] A. Well, it is about three and one-half miles, approximately, east toward Pittsburgh, from Rochester.

Q. From Rochester, Ohio?

A. Rochester, Pennsylvania.

By THE COURT:

Q. And how far from Pittsburgh?

A. About 21 miles west of Pittsburgh.

By MR. RICHTER:

Q. Will you tell us what members of the crew there were? There was a conductor——

A. Coming back we had a conductor; I was front brakeman, and we had a flagman, that is the train crew; and then there was the engineer and fireman, and as our engineer wasn't qualified he had another man as pilot.

Q. When you say he wasn't qualified, you mean he wasn't qualified in that territory?

A. On that division.

Q. And so the railroad put what they call a pilot on there?

A. That is right.

Q. This pilot controlled the operation of the engine in a certain specified territory?

A. Toledo Junction—he got off at Mansfield, because that is the junction point.

Q. Coming down to December 14, 1944, what kind of a day was [10] it?

A. It appeared to be a clear day; it was cold.

Q. Will you tell us, please, what happened as you were approaching the tower at Vernon?

A. It was on Tiro Hill.

Q. That is Tiro Hill?

A. Tiro Hill. It is not a very long hill in itself, but it has got some curves in it, and we couldn't make the hill. We had a heavy train.

Q. When you say you couldn't make the hill, you mean the engine couldn't haul the cars over the hill?

A. Yes, sir.

Q. What happened?

A. We stalled on the hill. I got down from the engine —the pilot had called the dispatcher on the telephone, and said he had been ordered to cut the train and double over the hill.

Q. Tell us what you mean by doubling over the hill?

A. Cut your train as near half as possible, take it over the hill and put it on the siding, and then come back and get the rest of the train and recouple and go on.

Q. And did you cut this train?

A. Yes, sir.

Q. What was done with the brakes on the half of the train that was left standing?

[11] A. We set those up.

Q. And who set those?

A. I set them by hand.

Q. And what happened to the front group of cars?

A. We took them over the hill to the Vernon siding.

Q. And who went over with the first group of cars?

A. The conductor and I, with the engine crew.

Q. And who remained back with the other half of the train?

A. The flagman, back at the rear, to protect the rest of the train. There was one track there.

Q. And you came to Vernon and put the cars on the siding there, did you?

A. Yes, sir.

Q. And then what happened?

A. We went back after the rest of the train.

Q. And coming back, how was the engine facing?

A. Backward.

Q. Where did you get on the engine?

A. I got on the tank, that is, the rear of the engine.

Q. This tank is a separate car from the engine?

A. That is right. I was up on the back, on the rear of the tank; it was in what we call the shelter for the brakeman, but in railroad parlance it is called the dog house—I don't know why—but it is called the dog house, and I was [12] in the dog house.

Q. This dog house is located where?

A. In the center of the tank, at the rear.

Q. And did you ride back on that trip in the dog house itself?

A. For part of the trip.

Q. And then did you come down out of the dog house?

A. Yes, I came down; I got out of the dog house as he made the crossing over the crossing, coming back, within 500 feet of the rear section of the train we had left.

Q. Tell the Court and jury what happened when you first got out of the crossing, what took place at the railroad crossing before you got back to the cars themselves.

A. I can't remember what road crossing it was—I think it is the Nickel Plate.

Q. The Nickel Plate Railroad?

A. I think it is. I saw there was a flagman there, and he signaled——

Q. Tell us what this man did?

A. We had the block against us, and that means we couldn't go over, this other train had the right-of-way——

Q. This train was going to cross your track?

A. That is right.

Q. And then what happened?

[13] A. The train was coming, and we were—we had the flag against us, and he saw we were coming a pretty good speed——

Q. Who is that?

A. The crossing man—and he kept motioning us to back, to back up:

Q. You mean to go ahead?

A. Even though the flag was against us, but evidently Mr. Crum, the conductor, didn't notice him, and we stopped. I yelled to come on. This other man didn't know what we were going to do; he had signaled to go ahead, and we came almost to the crossing and stopped, and he yelled with the megaphone to come on, get back here. I kept on flagging and hollered to come on back.

Q. So that you had been giving the signal to come on back but nobody had paid any attention to it?

A. No, sir, they were taking the signal at this other place, although I was giving them.

Q. They were not watching for your signal?

MR. PRICE: This has nothing to do with the accident, and I object to this diversion in the story, about something that happened somewhere else.

MR. RICHTER: It has this to do with it——

MR. PRICE: It has nothing to do with it.

MR. RICHTER: It shows on the entire trip the [14] lack of attention of the person who was supposed to be watching for signals; this is a little ahead, and we will follow it through to the next point. That is the purpose of showing this.

THE COURT: Objection sustained.

By MR. RICHTER:

Q. You eventually got across the crossing of the Nickel Plate?

A. That is right.

Q. And then where did you go?

A. I went back into the shelter until we came within 500 feet of the rest of the train.

Q. When you say within 500 feet of the rest of the train, you mean these cars that you left back on the track?

A. Yes, sir.

Q. When you were approaching the crossing, down to the point where you got out of the house, how fast were you going?

A. 15 to 20 miles an hour.

Q. What happened when you got down out of the shelter?

A. I crawled down the back of the tank, down the right-hand side, and stood on the stirrup.

Q. Where is the stirrup?

A. That is at the rear of the tank, on the side.

Q. And where did you get on the stirrup?

[15] A. On the right-hand—the engineer's side.

Q. Why did you get there?

A. So I could put myself in position where he could see my signals.

Q. And why were your there to give signals?

A. Because that is my duty, to couple up; that is my position.

Q. And you got out when you were about 500 feet from this crossing?

A. That is right.

Q. At that time did you start to pass signals?

A. I gave the steady sign; I thought he was going too fast.

Q. How did you give the steady sign?

A. By holding out your hand to slow down.

Q. Did the engineer slow down when you gave him that sign 500 feet from the crossing?

A. He didn't; he didn't.

Q. Then what did you do?

A. I waited a few car lengths, and put out my hand again.

Q. And then what happened, did he slow down?

A. It was ignored.

Q. Your signal was ignored?

A. Yes, sir.

Q. Then what did you do?

[16]. A. I waited until he was within a couple car lengths——

Q. How fast was the engine going?

A. He must have been going 12 to 15 miles an hour.

Q. Then what did you do?

A. I gave another steady sign.

Q. Was that observed?

A. Evidently it was not.

Q. Did the engine slow down any?

A. No.

Q. Then what did you do, Mr. Callen?

A. I gave the stop signal.

Q. How did you give the stop sign?

A. The stop sign, I dropped my hand down like that (indicating).

Q. And then what happened?

A. It was within a few feet of the other cars, and I knew if I stayed there, it would give me a twist and throw me under the wheels, and I jumped just before they coupled.

Q. Where had this train been cut, about?

A. It was at a crossing; I understand it was a country road. I asked the conductor if it was traveled much and he said "no." So, we kept the cars so that the drawbar of the cars were left out, and the coupler was out on the edge of the highway.

[17] Q. Was the drawbar set so that proper coupling could be made on impact?

A. That is right. It was cut that way, and nobody touched it.

Q. At any rate, how far was it from where you were hanging on the end of your tank to the cars that were about to be coupled on when you finally jumped?

A. Two or three feet, I suppose it was.

Q. When you jumped how fast was the engine going?

A. I would say about six miles an hour.

Q. What happened?

A. It coupled all right.

Q. What happened when you jumped?

A. I jumped off—I didn't fall on my face—I believe I stayed on my feet, but I gave myself a twist. I don't know how I twisted, but I gave myself a twist.

Q. When you twisted what happened after your body had twisted?

A. It seemed to twist—the way I felt later, it twisted at the small of the back.

Q. After the impact, was that a light impact or a sharp impact?

A. It seemed pretty solid to me.

Q. Could the cars in back move?

[18] A. No, they had air in them; the brakes were set.

THE COURT: Excuse me a minute. Your question was in the alternative, was it a light impact or not, and he said, "It seemed so to me." On the record it doesn't show whether Mr. Callen means it was a light impact or not?

THE WITNESS: It was a solid impact.

THE COURT: A solid impact.

By MR. RICHTER:

Q. You told us that the cars that you left behind had air in them?

A. That is right.

Q. And what does that mean?

A. The engineer leaves the air in the cars, and we set the brakes. When the engineer leaves air on he sets the brakes from the engine, and while the air is still on we put them on by hand. You can put them tighter that way.

Q. You mean you put the brakes on?

A. That is right.

Q. In other words, when you have the air on and you put the brakes on they are on extremely solid?

A. Yes, sir.

Q. And there wouldn't be any "give" when the engine rammed back against the cars?

A. No, they were solid.

[19] Q. Then what did you do after that?

A. I went back to the dog house.

Q. Did anybody release the brakes on the first five cars?

A. They tried to pull out—it slipped my mind as we went back to the dog house, but they couldn't pull it, and they hollered to see if I had let the brakes off, and I said "no"; I forgot. He said to let the brakes off, and I went back over the train and put the six brakes off, and we went back over the hill.

Q. And you went back in the shelter?

A. I went back on top of the tank.

Q. On top of the tank?

A. Yes, sir.

Q. And where did you ride to?

A. I went back to Vernon where we coupled up the train and went on to Conway.

Q. All right. When you came to Conway did you go home?

A. That is right.

Q. How did you feel?

A. I didn't feel very good.

Q. What was wrong with you?

A. My back was sore. I thought all the while it is just a little strain and I will get my wife to put some liniment on the back and it will be all right.

[20] Q. When did you have to go out on your next run again?

A. Approximately a day after.

Q. Did you go out on the next run?

A. I did not.

Q. Why not?

A. I felt too bad; my back pained terribly.

Q. All right. Now, did you eventually go on a run after that?

A. That is right.

Q. When did you go on next?

A. About the 19th.

Q. And where did you go that day on a run for the railroad company?

A. To Toledo.

Q. Were you able to return with your regular crew?

A. No, it kept getting worse. I told the conductor when we got to Toledo. I told the conductor I couldn't bring the train back, I would have to come back on the passenger train. He said, "What is the matter?" I said, "I hurt myself." He said, "When was that?" I said, "Back two trips before." He said, "Why didn't you report it?" I said, "I never thought anything about it." He said, "Do you want to make out an accident report on it now?" I said I didn't think it is any use because the seventy-two hours is up.

[21] Q. In other words, it was supposed to be in within seventy-two hours after the accident?

A. That is right.

Q. If it was anything serious?

A. That is right.

Q. And you finally came back on a passenger train to your home?

A. That is right.

Q. How did you feel when you got home?

A. No good at all.

Q. What was the matter with you, Mr. Callen?

A. It just kept ge''ing worse and worse.

Q. Did you get an 'edical treatment?

A. I went to Dr. Sheets.

Q. And what did Dr. Sheets do for you?

A. He gave me an injection in the back and taped me up.

Q. And how did you feel after that?

A. I felt a little better, and then it started to get bad and I went to see a chiropractor.

Q. And who was that?

A. Dr. Fair, at New Brighton.

Q. And how many times did you see Dr. Fair?

A. Around 15 or 16 times.

Q. And how did you feel then?

[22] A. Well, it was just a little better temporarily, and then it started getting worse.

Q. That treatment was manipulation with the hands?

A. Yes, sir. I was all right, I felt pretty good when he made the application and gave me the treatments, and then it seemed to go back again.

Q. How long were you getting any beneficial reaction from the treatment?

A. It seemed like a few minutes after the treatments it would go back again.

Q. Did you have any pain?

A. Pain?—it was terrible; I just couldn't sleep. Some nights I would lay awake all night. Other nights I could doze a little, and I would twist and try to get a little relief, and then I would wake up and doze a little bit more—I couldn't rest at all.

THE COURT: Would you mind showing the jury what part of his back was hurt, approximately. Just stand up.

MR. RICHTER: Will you stand up and turn around so that the jury can see.

THE COURT: And show the jury where your back was hurt; turn around.

THE WITNESS: (Standing) Right through here [23] (indicating). That is the small part of the back, the sacroiliac section of my back (indicating).

By MR. RICHTER:

Q. Well, now, Mr. Callen, you continued, as you explained, for some fifteen treatments with this chiropractor, and you still continued to have pain in your back?

A. Yes, sir.

Q. Did you call on the railroad for any aid?

A. I went to the relief doctor.

Q. And where was he?

A. He was down at Conway.

Q. What did he do for you, if anything?

A. He didn't do anything.

By THE COURT:

Q. Did he try to do anything, Mr. Callen? You said he did nothing.

A. He couldn't; he was just giving orders back to work.

Q. Who was?

A. He just gave little minor treatment—taking things out of the eye—he is the first aid doctor.

By MR. RICHTER:

Q. In other words, he would give you orders to return to duty?

A. That is right.

[24] Q. Did he give you a return to duty card?

A. No, he did not.

Q. What did you do with reference to the railroad—did you get in touch with the railroad after that?

A. I felt I ought to go back to work, because I needed the money, and so I wrote and got in touch with Richard, the district claim agent in Pittsburgh, for that division, that is, the East Ohio Division.

Q. And what did he do?

A. Well, he said he had no record, and he phoned out where the accident happened, and found it was in the Toledo district, and he said to get in touch with R. E. Veidt, at Toledo.

Q. And did you do that?

A. I did.

Q. What happened, did you go to Toledo or——

A. He sent for me to go out on a certain train and see him.

Q. And did you go to Toledo and see him?

A. I did.

Q. Did you see Mr. Veidt?

A. I did.

Q. What happened when you saw Mr. Veidt?

A. I went to his office, and he asked me about it, and I told him, and he asked me to make a statement, which I did.

Q. Did he write out a statement?

[25] A. That is right.

MR. RICHTER: I assume you have the original of this, Mr. Price?

MR. PRICE: I don't know.

By MR. RICHTER:

Q. I show you a typewritten carbon copy, and ask you whether this is a copy of the statement that you made? (Producing same.)

A. That is right.

MR. RICHTER: May I just mark this for identification, if Your Honor please, at this time?

THE COURT: He made it to——

MR. RICHTER: Mr. Veidt, in Toledo.

THE WITNESS: Yes, sir, on February 14.

MR. RICHTER: February 14, 1945.

MR. PRICE: I object to the use of the copy. Here is the original. (Producing same.)

MR. RICHTER: If you have the original—mark it as an exhibit.

(The statement referred to, dated February 14, 1945, was marked as Plaintiff's Exhibit 1 for identification.)

MR. RICHTER: All right.

By MR. RICHTER:

Q. Well, Mr. Callen, after you made your statement and you [26] discussed how this thing happened, what did

Mr. Veidt say to you, and what did you say, and where did he take you?

A. Well, he said, "Something is wrong with you; we want to find out what it is." He said let us go down in my car and we will get some X-rays made of your back.

Q. And where did you go?

A. I think it was an X-ray clinic in Toledo.

Q. In Toledo?

A. Yes, sir. We went down, and they took a number of X-rays, and then we came back to his office.

Q. He took you back to his office?

A. That is right.

By THE COURT:

Q. And did you have an X-ray taken?

A. Several, there were several X-rays taken, Your

By MR. RICHTER:

Honor.

Q. Then what did you do?

A. We came back to the office. I didn't know what was coming off then. He says, "What about it?" I said, "Well, what do you mean?" He said, "You got a lot of gall coming in here asking for anything like that and there is nothing wrong." I said, "What do you mean? I ought to know, it is my back." It pained me so I could hardly sit on the chair at the time. He said, "I can't do anything about that. What [27] do you expect?"

I said, "I tell you what I expect. I would like to have my wages and my doctor bill." Because I felt I needed that, the way I was, or the position I was in. He said, "We can't do that." I said, "What am I going to do?" He says, "I can only allow you $250. What is your wages?" I told him I lost at least $300 or more. He said, "I can't allow you over $250, but if you want any more you will have to see the chief claim agent over the whole Western Region, in Chicago."

Well, I didn't know what to think; I wanted to get back to work. I didn't like to lose time. My wife was expecting a baby and we needed money, and I was counting on this money coming from my different runs.

Q. And what did he say about the job?

A. I was all right to go back to the job; there was nothing wrong with me.

I got to thinking, maybe there wasn't, and I took it for granted I was all right; a little sprain, and I would be all right, and I could get back within a week or so.

He said he couldn't give me more than $250. I did a little figuring and I said why not take the check for $250 and lose a little bit. I had never been to Chicago, and he told me he might be gone for several months, and I [28] wouldn't be able to see him, and I thought I might as well take it—take the loss on the rest of the money between $250 and the loss in wages, and that would help me out some, and I could go back to work, and that would be better than losing time in Chicago and not seeing the man after all.

Q. Was the fact that he told you that you would be able to go back to work a factor in accepting the $250?

Mr. Price: That is objected to as leading.

The Witness: That is right.

The Court: The objection is sustained, as to the form; ask him what influenced him.

By Mr. Richter:

Q. What influenced you in accepting this $250?

A. The fact he said there was nothing wrong with me and I could go back to work.

Q. And you accepted the $250, did you not?

A. Yes, sir.

Mr. Richter: Will you produce the original check, Mr. Price, please?

(Counsel produces same.)

By Mr. Richter:

Q. Now, I show you a release, which I will ask the reporter to mark as an exhibit.

(The release referred to, dated February 14, [29] 1945, was marked Plaintiff's Exhibit 2 for identification.)

By Mr. Richter:

Q. And ask you if this is the release you signed on that day?

A. Yes, that is my signature.

Mr. Richter: Would Your Honor like to look at it?

The Court: Yes.

Mr. Richter: And may I mark this Exhibit 3, the check?

(The check referred to was marked Plaintiff's Exhibit 3, for identification.)

By Mr. Richter:

Q. And ask you whether this is the check that was drawn to your order, and whether this is your signature on the back?

A. That is right.

Mr. Richter: Very well. This check says, "Not good for more than $250.00."

By Mr. Richter:

Q. After you left Mr. Veidt in Toledo, did you go back home, or where did you go?

A. I came back to see how my wife was.

Q. Where was your wife at the time?

A. Hospital.

[30] Q. What hospital?

A. She was in the Beaver Falls Hospital.

Q. And how long did you stay there?

A. I didn't stay all night, but I stayed where I could see her every day.

Q. And then did you go back home?

A. Yes, my other two children were home.

Q. How old are these children, by the way?

A. The oldest one is past nine; she was nine on the 17th of this April, last April; and the second one will be six in September.

Q. Now, was your wife in the hospital at that time expecting delivery?

A. That is right.

Q. That is right?

A. That is right.

Q. Did you go back to your children, as I understand, in a few days?

A. Yes, sir.

Q. When you came home, how did you feel, were you able to go back to work?

A. Absolutely not.

Q. What was wrong with you?

A. My back seemed to be getting worse. While I was out [31] I missed treatments,—when I was out to see Mr. Veidt and see my wife,—I didn't get any treatments then, and these treatments, of course, were just temporary,—they just helped me while I was taking the treatment and several hours afterward.

Q. Did you have any medical treatment after that?

A. I went back to Dr. Sheets when I didn't get any permanent relief from the chiropractor treatments.

Q. From the time you were going to Dr. Sheets, following the time you came from Toledo to see Mr. Veidt, did you go to any local physician to see about getting a return to duty card?

A. I went once, and asked him, and he asked how I felt; well, I told him I would try to get by. He said, "Are you able to go back?" I said I didn't feel like going back, and I told him how I felt. He said, "You aren't fit to go back, and I can't give you a return to duty card." He says,

"You go back home and wait a while." I started to get my relief from the railroad.

Q. That is a sort of insurance that you have——

A. That is right.

Q. A sort of health insurance that the railroad employees have for themselves?

A. Yes, sir.

Q. You didn't get a return to duty card?

[32] A. No.

Q. Can you return to duty without that card?

A. No.

Q. Did you start going to Dr. Sheets again?

A. Yes, sir.

Q. And how long did you continue to see Dr. Sheets?

A. Twice a week.

Q. Until when?

A. Well, it was up in June, I believe.

Q. Sometime in June of that year?

A. That is right.

Q. You returned to Dr. Sheets for treatments,—would you say that it was sometime late in February or the beginning of March?

A. It was the latter part of February, because it was about two or two and a half months from the time I went to take treatments I went out to see Mr. Veidt and came back to my wife, and I had been trying to use liniment, and then I went back to take more treatments with Dr. Sheets.

Q. Now, Mr. Callen, you then had these treatments twice a week until sometime in June, 1945?

A. That is right.

Q. What was the nature of the treatment?

A. It was,—I don't know what the medicine was, but he [33] used a needle, and injected this fluid in both sides of the lower back, and I wore a sacroiliac belt for a while.

Q. Who got this for you?

A. Dr. Sheets.

By THE COURT:

Q. What kind of belt?

A. A sacroiliac belt.

By MR. RICHTER:

Q. Did you get any better during that time?

A. I didn't get any permanent relief from it at all.

Q. Thereafter, did you try to go back to work during that time?

A. I went in the first part of May; I called up once, and they wanted me to come in.

Q. Who was that?

A. Dr. Sayer.

Q. Who is Dr. Sayer?

A. He was a relief doctor at Conway.

Q. Did you go to Dr. Sayer?

A. I couldn't make it that trip, but I made it later.

Q. And what did he do?

A. He checked me all over and asked me a few questions. He said, "You will have to go and see Dr. Saul, in Pittsburgh. I can't do anything for you."

[34] Q. Would Dr. Sayer give you a return to duty card?

A. He said he couldn't.

Q. Did you hear from Dr. Saul?

A. I was told to go to Dr. Saul.

Q. And did you go to Dr. Saul?

A. I did.

Q. I show you a card dated April 26, 1945,—which I will ask to have marked as an exhibit——

(The postal card referred to, postmarked April 26, 1945, was marked Plaintiff's Exhibit 4 for identification.)

By MR. RICHTER:

Q. It is addressed to Rudy E. Callen, R. D. No. 2, New Brighton, Pennsylvania, from Dr. R. D. Saul, Medical Examiner, Pittsburgh, and ask you if you received that card?

A. I did.

Q. Did you go in to see Dr. Saul when you received that card?

MR. PRICE: May I see it, Mr. Richter.

MR. RICHTER: Would you like to see it?

MR. PRICE: I never saw it before.

MR. RICHTER: I thought you knew what they were?

By MR. RICHTER:

Q. Upon receipt of this card, did you go back to Dr. Sayer, [35] or see the doctor in Pittsburgh?

A. I called, and I went a couple days later.

Q. When you went, did he give you a return to duty card?

A. He did not. He asked me the situation, and I told him I wasn't any better.

Q. Did he examine you?

A. He checked me over, and said, "How do you feel?" I told him exactly how I felt.

By THE COURT:

Q. What did you tell him?

A. I told him my back was still bothering me a good bit, and the pain was as bad as it ever was, in fact, it seemed to be getting worse. I started to wonder about the situation, from being in Toledo, and I asked him if I could see the results of the X-rays in Toledo, and he gave me or showed me a typewritten copy of what the results were from Toledo.

By MR. RICHTER:

Q. Do you remember what it said?

A. I can't remember the exact wording, only——

MR. PRICE: I object to it.

MR. RICHTER: We will call for it in due course. I will ask Mr. Price to produce it.

By THE COURT:

Q. After you saw that record from Toledo, did you say anything [36] to the doctor about it, or did he say anything to you?

A. No, he didn't say any more about it.

Q. You just looked at it?

A. I had it and knew about it.

THE COURT: I understand it will be produced.

By THE COURT:

Q. You didn't discuss it with Dr. Saul?

A. No.

By MR. RICHTER:

Q. At any rate, did he give you a return to duty card?

A. No, he did not.

Q. Then, what happened?

A. All I could do is go back home. I came back and was still taking treatment from Dr. Sheets.

I think it was about around the middle of June I got word from the railroad to report for duty by the 20th of June or I would be dropped from the roll or roster. That meant you are cut off with no more jobs.

Q. That is following your call in response to this card?

A. That is right. As soon as I received the notice from the railroad I called up Dr. Sayer. I said, "Doctor, you should know how I feel." He said, "That is what you say."

I said, "The only thing I can tell you is how I feel. What are we going to do? They are going to drop [37] me." He said, "I can't do anything about it."

Q. Notwithstanding he couldn't do anything about it, he refused to give you a return to duty card?

A. That is right.

Q. So that they dropped you from the rolls of the railroad, cut off your relief, and at the same time wouldn't give you a return to duty card?

A. That is right.

MR. PRICE: That is objected to.

By MR. RICHTER:

Q. Now, then, Mr. Callen——

MR. PRICE: Did you want to rule on my motion?

MR. RICHTER: What was the objection to that? I don't understand.

MR. PRICE: It is grossly leading, and it is not a question,—it is a statement by counsel.

THE COURT: I understand he is repeating what the witness had said and asking if he affirms it. Your thought is that it is in the nature of a leading question?

MR. PRICE: It is leading and argumentative, and made by counsel instead of the witness. I have no objection to the witness testifying, but I object to counsel's statements.

THE COURT: I sustain the objection.

[38] MR. PRICE: And I ask that the question and answer be stricken.

THE COURT: Strike it out.

By MR. RICHTER:

Q. What happened to your relief?

A. It was cut off.

Q. Did they give you a return to duty card?

A. They did not.

Q. Did you want to go back to work?

A. I tried to go back to work.

Q. Then what did you do?

A. What did I do?

Q. Where did you go?

A. I had to come to Philadelphia.

Q. And who did you go to see?

A. First of all, I went to—they told me to see the chief claim agent.

Q. Who was that?

A. I don't remember his name; he was supposed to be in Broad Street Station. I went to 30th Street Station, and they referred me to Broad Street Station. I went to Broad Street Station, and they referred me to 32nd Street. I went to 32nd Street and they referred me to 30th, and I got disgusted then. I thought I was getting the "run-around." [39] About the only thing I could do was to get in touch with someone who could give me some satisfaction. So, I got in touch with Mr. Griffiths.

Q. Edward J. Griffiths, a member of the Philadelphia Bar?

A. Yes, sir.

Q. And Mr. Griffiths referred you to me to try this case?

A. That is right.

Q. I had you examined by Dr. Paul Jepson?

A. Yes, sir.

Q. And did you go to Dr. Jepson——

A. Yes, sir.

Q. For examination and treatment?

A. I did.

Q. How often did you see Dr. Jepson for treatments?

A. I think it was sometimes three treatments a week; sometimes two.

Q. At Dr. Jepson's office?

A. That is right.

Q. What kind of treatment did you get?

A. Massage and baking treatments.

Q. That is hot pads put to your back——

A. A kind of baker——

By The Court:

Q. Surgical baking with electric light?

[40] A. Electric light, controlled at different heats.

By Mr. Richter:

Q. Did you get any relief from this treatment?

A. Temporary relief.

Q. How long did you continue under these treatments?

A. I would say around September.

Q. Until September?

A. Around the first part of September, I believe.

Q. How did you feel after that course of treatment?

A. It would give me temporary relief while I was taking it, and then the pain would come back again after the treatment was over, after I got home a short time.

Q. After you stopped in September, did you feel considerably better than you had been?

A. I felt some better, but not much.

Q. Did you return to work finally?

A. I waited until—I didn't feel like it—but I waited until the first of October, and in October I got a job at Ambridge, Pennsylvania, the National Electric Products Corporation.

Q. What did you do?

A. I worked in the department, handling pipe. They put them in a bundle with a chain.

Q. And your whole job is to hook the chain——

[41] A. The chain is on the crane, and you take it and swing it around the pipe, and then they lift the pipe.

Q. How did you feel when you went to work?

A. I didn't feel any better, but there were times I felt worse; every once in a while there would be a strain—you couldn't keep walking upright. I still belong with that company.

Q. You still work there?

A. That is right, but I had to lay off for ten days in February.

Q. Why did you have to lay off ten days in February?

A. Because of pain.

Q. That is this year?

A. February, 1946; I was off for ten days because of pain—the pain got too severe again.

Q. Did you return to anybody for medical treatment after you went back?

A. I went to see Dr. Sheets again.

Q. And you still go to Dr. Sheets?

A. I still go to Dr. Sheets and get one treatment a week.

Q. When was the last time you saw Dr. Sheets?

A. Wednesday of last week.

Q. And how is your back today?

A. Still hurts, still pains; still is pain in the small [42] part of the back.

Q. What kind of pain is it?

A. It is hard to tell, how you can describe it; it is sharp at times, and then it is just a dull aching pain; and at times it gets you when you lift a little too much. The nearest thing you could say how it felt, if you had a toothache that bothered you all the time, and then all at once it hit you like a sharp toothache pain. That is just the way it gets me in the back.

Q. What do you earn a week at the Ambridge plant?

A. In the neighborhood of $35 a week, full time.

Q. And how much did you earn while you were working for the railroad, an average month?

A. Well, $50 or $60.

Q. A week?

A. That is right.

Q. So that there is a variation of from $20 to $25 a week in your earning from what you earned when you were with the railroad?

A. That is right.

By The Court:

Q. You wear a belt continually at your work, Mr. Callen?

A. Yes, I left the belt off when I came here; the doctor put tape on my back.

[43] By Mr. Richter:

Q. How do you feel when you walk up steps?

A. When I can walk up perfectly straight the pain is lessened. If I go up a steep flight it affects me, or if I have to lean over.

Q. Do you do any lifting of any kind?

A. Not very much, because you couldn't—there is a strain there (indicating).

By The Court:

Q. If you keep your back rigid, like a lead pencil, and walk on the ball of the foot, could you walk up the steps?

A. It doesn't hurt so much; it is when you lean over, when you are hooking the chain on that it hurts.

By Mr. Richter:

Q. There is one thing I overlooked asking you. At what speed should the engine have been coming back when it was about to make the coupling?

A. It should be around two miles an hour.

By The Court:

Q. How much?

A. About two miles an hour.

By Mr. Richter:

Q. Would you say it should not be more than two miles an hour?

[44] A. It should not be more than two miles.

By The Court:

Q. Is that your personal judgment, Mr. Callen, or is it an accepted rule in the railroad world?

A. That is what we were told when we were given our training for trainmen.

Q. Instruction?

A. That is right.

By Mr. Richter:

Q. Now, Mr. Callen, have you on occasions had reason to jump from trains when the train was going as fast as six miles an hour?

A. That is right.

Q. What is the difference between those occasions and this one?

A. It makes a lot of difference, because when you are riding in the engine and going ahead, there is a footboard on some engines. You can step off from there, but you are not allowed to stand on the footboard when you are backing up; you are not allowed to stand on the end of the engine facing the direction of travel.

At other times I had to drop off on different local trains at the rear end——

Q. In what direction were they going, backward, as this one [45] was?

A. No, they were going ahead, going forward.

Q. You can't stand on this end board; on this occasion you were standing on the side?

A. That is right.

Q. And that is perfectly proper?

A. That is the only place you can stand when the engine is backing up.

Mr. Richter: Cross-examine.

Cross-Examination.

By Mr. Price:

Q. What was the first doctor you went to, Mr. Callen?

A. What is that?

Q. Who was the first doctor you went to?

A. Dr. Sheets.

Q. And when did you go to him?

A. I would say the latter part of December.

Q. You can't make it any closer than that?

A. No, no—I came off on the 20th, and when I got home my wife doctored me with liniment, and I suffered through

Christmas Day. Then I went, I think, around the 27th—I wouldn't say for sure.

Q. But it was sometime the last week in December?

A. I think the last week in December.

[46] Q. How long did you go to him before you went to the chiropractor or osteopath?

A. I don't know the exact time. I took some treatments with him.

Q. Do you remember how many?

A. Well, I couldn't say just how many.

Q. Do you know for how long a period it was?

A. It wasn't very long; it was just about a week or so, and then I thought the chiropractor could do more good, I thought, maybe, there would be a vertebrae out of place.

Q. And then you went to the chiropractor?

A. Yes, sir, that is right.

Q. How long did you go to him before you went to another doctor?

A. I believe I took a treatment the night before I went to see Mr. Veidt, that would be about the 13th of February.

Q. Then you were still under his care when you saw Mr. Veidt?

A. That is right.

Q. And where did you go then?

A. I didn't go back to any other doctor right away; I came back to see my wife.

Q. Where was Dr. Fine's office?

A. Dr. Fine's office is in New Brighton, 1208 Third Avenue.

[47] Q. That is in the same town you live in?

A. I live in the country, R. D. No. 2, from New Brighton.

Q. And how far away from New Brighton?

A. About seven miles from New Brighton.

Q. And how did you get to the doctor?

A. I had the bus.

Q. Was your wife at home or in the hospital?

A. She is at the hospital.

Q. In New Brighton?

A. New Brighton Hospital.

Q. And how long was she there?

A. Well, it was a false alarm at the time.

Q. But how long was she there then?

A. About a week.

Q. You had plenty of time to see Dr. Fine during that time?

A. I had, but I had some other things on my mind.

Q. Did you see Dr. Fine at all during that week?

A. No.

Q. Although you were in town visiting your wife at the hospital?

A. That is right.

Q. When did you go to see Dr. Fine next?

A. I didn't get relief, and I went to Dr. Sheets. After I was home about a week with the children I went to Dr. Sheets.

[48] Q. You left Dr. Sheets in the first place because he didn't give you relief, and then you went to Dr. Fine?

A. I got three months with injections in the back.

Q. Isn't that the reason you left Dr. Sheets in the first place?

A. I thought my vertebrae was out of place, and my wife said to try that, and I went to the chiropractor to see if an adjustment could straighten me up.

Q. But you said that the results from Dr. Sheets convinced you that he wasn't doing you any good?

A. I got no permanent relief out of the treatment.

Q. And why did you go back to Dr. Sheets afterward?

A. Well, I figured it was a mistake on the part of the chiropractor; he didn't give me treatments, and maybe I could get relief from Dr. Sheets. I was willing to try anything.

Q. When did you first see a railroad company doctor, a relief doctor?

A. I can't give you a definite date on that, because I went to see Dr. Sayer——

Q. When was that?

A. I couldn't say that.

Q. Approximately when?

A. I believe it was in March the first time.

Q. And where was Dr. Sayer?

[49] A. In the Conway Yard.

Q. And what is he?

A. He is the relief doctor. You got to get a return to duty card. When you sign off, you got to have a R. D. card.

Q. What kind of treatment does he give in the office there?

A. He doesn't give any treatment, as far as I know,—minor treatments, that is all.

Q. He is in the office to render first aid to somebody who cuts a finger or gets something in his eye?

A. That is right.

Q. That is the only kind of work he does?

A. That is right.

Q. Then, the first aid doctor was the one who was the proper one to fix up your back?

A. No——

Q. Why didn't you go to him?

A. Well, I wanted to get back to work. I went to see him if I could get a return to duty card.

Q. You didn't go for treatments, you just went to him for a return to duty card?

A. That is right.

Q. And he wouldn't give it to you?

A. He wouldn't give it to me.

Q. Because you told him your back was sore?

[50] A. He asked me how I felt, and I told him.

Q. You told him your back was too sore to work?

A. I told him my back was sore; I said I would try to work. He says you can't make it.

Q. You told him that your back was sore at the time?

A. That is right.

Q. Did he make any examination of you?

A. No.

Q. He took your word for it, that your back was too sore to work, and he wouldn't let you go back?

A. That is right.

Q. When was the next time that you saw a railroad doctor?

A. In April around the first part of April.

Q. Who was it that you saw then, and why?

A. I talked to Dr. Sayer, and he told me to see Dr. Saul.

Q. Dr. Saul is in Pittsburgh?

A. That is right.

Q. That is in April you first went to him?

A. I went to Dr. Saul the first part of April, I believe.

Q. The first part of April, 1945?

A. 1944.

Q. 1944?

A. 1945, that is right.

Q. That was as a result of some conversation that you had [51] with Dr. Sayer?

A. That is right.

Q. You didn't go back to Dr. Sayer for treatment?

A. Oh, no.

Q. And so you went to Dr. Saul?

A. That is right.

Q. For treatment?

A. I went in for consultation, too.

Q. When was that, do you remember?

A. I think it was around the first part of April, 1945.

Q. Did Dr. Saul examine you?

A. He gave me a preliminary, you might say, examination; he asked me the same thing as Dr. Sayer, how I felt, and we discussed the case up to that time; what transpired.

By THE COURT:

Q. Did he examine your back?

A. I don't think he did.

By MR. PRICE:

Q. He didn't examine your back?

A. No, he didn't.

Q. You were getting relief payments at the time?

A. That is right.

Q. You were on relief from the railroad?

A. That is right.

[52] Q. You said that he showed you or talked to you about some report they had gotten from Toledo?

A. I don't understand your question exactly.

Q. I thought you said something about having been shown or having been told about a report from Toledo?

A. I asked him about the X-ray, if he had heard the result of the X-ray.

Q. Was that in April?

A. I believe that was sometime in April.

Q. How many times did you see Dr. Saul?

A. I believe it was twice.

Q. And when was the second time?

A. That was sometime later.

Q. How much later?

A. I would say around the first part of May I was able to make another trip to Dr. Saul.

Q. That is about a month later?

A. In that vicinity.

Q. And were you going to Dr. Sheets in the meantime?

A. Yes, I was going to Dr. Sheets.

Q. How often?

A. About twice a week.

Q. And then you went back to Dr. Saul again?

A. I think it was two treatments, or twice I seen Dr. Saul [53] altogether.

Q. Did you go on your own responsibility, or at his request?

A. He asked me to come back.

Q. How soon did he ask you to come back?

A. He said to try to get back every month. He asked me if I could make it, and I said it depends on how I feel. If I would be able to come in, I would come, if not, I would call.

Q. You went back in April as the result of getting this post card?

A. That is right.

Q. You had not gone back before you got the post card?

A. I did; I think I was there in the latter part of March or first week of April; I couldn't make it when he wanted me in at that time. I think that is the first week in May when I saw him on that.

Q. That is after you got this postal card marked Plaintiff's Exhibit 4?

A. That is right.

Q. "In order that further relief from benefits be allowed, it is necessary that you call at my office as soon as possible. Please bring this card with you. If unable to call, write."

A. That is right.

Q. It took a card like this to bring you back to Dr. Saul's office?

[54] A. No, it didn't——

Q. Why did you wait until you got the card before you went to see him?

A. I couldn't make it before.

Q. Why?

A. Because of the pain, I couldn't get in.

Q. But you were going to Dr. Sheets?

A. Yes, I was helped in.

Q. How far from Pittsburgh do you live?

A. I think it is about 25½ miles.

Q. Did you go in by train?

A. By train.

Q. On a pass?

A. That is right.

Q. What do you mean, you rode in on a pass for seven or eight miles?

A. No, I went in with a neighbor.

Q. What?

A. A neighbor went in with me.

Q. You went on the bus?

A. That is right.

Q. You could ride on a bus for seven or eight miles but you couldn't ride on a train twenty miles,—is that what you want us to believe?

[55] A. That is what I said.

Q. Then you saw Dr. Saul twice in all, is that right?

A. I would say that.

Q. Then, what was this letter you said you got in June?

A. I got a letter in June from the company saying if I didn't return to duty by the 20th of June I would be dropped from the roll.

Q. Have you got the original of that letter?

A. I haven't.

Q. What?

A. I haven't got the original of the letter.

Q. Would you recognize a copy of it if you saw it?

MR. PRICE: If you will mark that Defendant's Exhibit 1.

(The letter referred to, dated June 15, 1945, was marked Defendant's Exhibit 1 for identification.)

By MR. PRICE:

Q. I show you a copy of a letter, and ask you whether that is the copy of the letter that you refer to?

A. I don't remember receiving a letter that long, but the matter in there is a good bit the same.

Q. It says about the same thing but your recollection is perhaps it wasn't that long?

A. That is right.

[56] Q. But the gist of it is about the same?

A. It is about the same.

Q. The substance of it?

A. That is right.

Q. Even if the words are not exactly identical, the substance of it is the same?

A. That is right.

Q. Then, as a result of that letter, what, if anything, did you do?

A. I called Dr. Sayer and I told him about receiving the letter, and I said what to do. I said you know I am not able to go back to work. He said, "That is what you say." I said, "I have been there to you and told you all about it." He said, "I can't do anything about it." He said, "Are you coming in?" I said, "I can't make it right now." Consequently, I overrun the ten days as it says in the letter.

Q. You just talked once with Dr. Sayer?

A. That is right; I told Dr. Sayer to get in touch with Dr. Saul.

Q. You told Dr. Sayer to get in touch with Dr. Saul?

A. Because I couldn't,—the through line was bad; it was a party line.

Q. Then about two weeks later, did you get a letter from the freight trainmaster?

MR. PRICE: If you will mark this.

[57] (The letter referred to, dated July 7, 1945, was marked Defendant's Exhibit 2 for identification.)

By MR. PRICE:

Q. Did you get a letter from the freight trainmaster of which this is a copy?

A. This is the letter I had reference to when I said about the short letter. I received one of these.

Q. You received the original of that letter?

A. I got to say so.

Q. There isn't any doubt of it?

A. No, I had reference to the short letter; that is the one I had reference to before. I received this one.

Q. You received this one, and after you got the second letter, Defendant's Exhibit 2; did you go to any more railroad doctors?

A. No more railroad doctors.

Q. Did you go to the freight trainmaster?

A. I didn't; I called.

Q. Or the assistant trainmaster?

A. I did not. I took for granted that the letter said final, and I considered it as final.

Q. I see. When you first saw Mr. Veidt in Toledo, you were still going to Dr. Fair?

A. To Dr. Fair.

[58] Q. He had not discharged you?

A. No.

Q. He was still giving you treatment up to that time?

A. He gave me treatments until the night before I left.

Q. You had been going to him regularly for several weeks?

A. That is right.

Q. Why was it that you said you believed the claim agent about your condition when your doctor told you that you weren't cured?

A. He said there was nothing wrong with me and to go back to work. I thought he knew what he was talking about.

Q. You want this jury to believe because a claim agent who was settling the case with you told you that you were all right, to go back to work, you believed him and not your doctor?

A. No, I didn't mean that at all; I said we were coming back from the X-ray clinic and I didn't know anything about that. I thought he knew what he was talking about. I never had any X-rays taken in New Brighton.

Q. You thought that the claim agent was a better doctor than Dr. Fair?

A. No, I didn't think that at all.

Q. Did you think he knew more about your back than you did?

A. Well, he just came from the X-ray clinic. I didn't know [59] what the X-ray clinic said. I had no word from there.

Q. You had not heard what the X-ray showed?

A. No.

Q. You just went from the clinic back to his office?

A. That is right.

Q. You didn't stay at the X-ray clinic?

A. Not very long.

Q. Was Mr. Veidt with you when you had the X-ray taken?

A. He was out in the hall.

Q. He wasn't in the room with you?

A. No, he wasn't.

Q. And then you came out of the room where you had the X-ray taken and went back to his office?

A. Yes, I would say we went back.

Q. You said you went back,—did you linger on the way or go some other place, or straight back?

A. We went right back.

Q. And when you went back that is when you say he told you there was nothing the matter with your back and you could go back to work?

A. That is right.

Q. Although you now say you had pain in your back continuously from the accident the early part of December, you want this jury to believe you accepted that statement against your [60] doctor's report and against your experience for over two months?

A. What I felt about it is what I said before: I wanted to go back to work, not that I was able to go back to work, but I wanted to go back to work to take care of my family. I was willing to try to go back to work if at all possible; it wasn't that I felt I could go back to work.

Q. Did you think you could go back to work at that time?

A. I didn't know; I didn't feel like it, that is a cinch.

Q. I am asking how you felt, not what you guessed about the future.

A. I didn't feel like it at the time.

Q. Did you feel at that time you were able to go back to work?

A. I don't know.

Q. You knew that yourself, you didn't have to have anybody tell you that?

A. You can say that again, that is right.

Q. You didn't have to have the claim agent tell you that?

A. That is right.

Q. Even if he had told you you were able to go back to work you wouldn't believe him anyway?

A. I told him how I felt; I didn't feel like going back.

Q. If he told you that you were all right and could go back [61] to work you knew that wasn't right?

A. Of course, I knew how I felt, I couldn't.

Q. Why did you say the reason you accepted the $250 was because the claim agent told you that you were all right?

A. I thought he might know more about it than me.

Q. How could he know more about the condition of your back than yourself, when you told him you couldn't go back,—you knew you couldn't go back?

THE COURT: Let's not get it wrong. The impression that Mr. Callen is telling us about,—I want to be sure I don't get him confused,—we want to be able to distinguish between what Mr. Callen considers his feelings and what he considers may have been actually wrong with him. I gather from what he is telling us that he is trying to say he knew his own feeling but thought as a result of this X-ray examination when the doctor told him to go back to work, there was nothing

wrong with him notwithstanding his feeling, there may not have been anything actually wrong. That is what he told us,—if that is wrong, I want to get it straight. I don't want any confusion later on. I want to know definitely, and everybody concerned, because this question will have to be reached with actual facts and the principles of law that govern it, and I don't want the jury to get it wrong. If that is just what you want us to understand—am I correct?

[62] THE WITNESS: That is exactly right. Maybe I didn't express myself clear enough.

THE COURT: I have a responsibility later on, and I want to get myself straight.

By MR. PRICE:

Q. You were not concerned with what name was given to your complaint?

A. No, I had pain; I don't care what you call the pain,—I had the pain.

Q. It didn't make any difference what the X-ray showed?

A. Well, I would like to know what was wrong.

Q. Yes. But, no matter what it showed, it would not affect your feelings whether you could go back to work, would it?

A. That is hard to say. If there is any vertebra out of place I couldn't go back to work.

Q. Whether it was out of place or not—suppose the X-ray didn't show any vertebra out of place, would you ay you would have been able to go back to work then?

A. No, because I still had pain.

Q. That is what I am asking you. What difference would it make to you what the X-ray showed with regard to your ability to go back to work at that time?

A. I just wanted to know what was wrong.

Q. Yes, sir. That is the only reason you were concerned [63] with the X-ray, you wanted to know what it showed, if anything?

A. Absolutely.

Q. You didn't expect a claim agent who wasn't a doctor to diagnose your condition, did you?

A. Of course not.

Q. Of course not, and you weren't going to take a claim agent's diagnosis of your condition when you had the doctor?

MR. RICHTER: If Your Honor please, there is no contention in this case that he asked the claim agent for a diagnosis. The X-ray man apparently reported to the claim agent, and that is the report the plaintiff was relying on. Mr. Price knows that.

MR. PRICE: That is not true, and therefore I must object to counsel's erroneous statement. Your Honor is undoubtedly familiar with the fact that you wouldn't get an interpretation of an X-ray for a considerable period of time after it is taken, and therefore there is no evidence that the claim agent knew at the time.

THE COURT: I understood Mr. Callen to say after he came home with the doctor who took him to the X-ray for examination, when he came back he said that "you got a gall"——

MR. RICHTER: That is right—the claim agent said that.

[64] THE WITNESS: The claim agent.

THE COURT: What took place between the doctors we don't know. But, the question is whether the statement that the first doctor made about having gall to ask for a release, that there was nothing wrong with him, whether or not this man was lulled into the belief that anatomically there was nothing wrong. He knew he had pain, he says, but didn't know what was wrong. That is why patients go to the doctor; they don't need the doctor to tell them they got pain, but they don't know the cause of the pain.

The question is, did this doctor who told him that you got gall to ask for something in the way of relief, did he create the impression in Mr. Collen's mind that there was nothing seriously wrong? Mr. Callen said he thought the doctor knew more about it than he did. Are we all agreed?

MR. PRICE: No, sir.

THE COURT: What is your thought?

MR. PRICE: Because, Your Honor has mistakenly stated that a doctor told him that; there was no doctor there.

THE COURT: Told him what?

MR. PRICE: That he had gall.

THE COURT: Who was it said that?

THE WITNESS: The claim agent.

MR. PRICE: The claim agent.

[65] THE COURT: He was the one who took him to the doctor for the X-ray.

MR. PRICE: That is correct.

THE COURT: We will rephrase that.

Who was the representative of the company with whom he was supposed to deal?

MR. RICHTER: The claim agent took him to the X-ray specialist.

THE COURT: And when he got home to the claim agent's office this dialog took place between them.

Do you want to ask any further questions along that line?

MR. PRICE: I would like, Your Honor, to correct the statement that they went to his home.

THE COURT: Went back to the office.

MR. RICHTER: Back to the office.

THE COURT: It doesn't make any difference whether it is home or office; he went with the claim agent who took him to the X-ray specialist, and came back to the office or whatever it was,—that is immaterial. If you want it home or office, let it be office,—he came back from whence he started, is that correct?

THE WITNESS: That is correct.

THE COURT: And then you had this discussion. [66] Now, Mr. Price wants to ask ~~you~~ some questions as to why you said you wanted a return to work card when you say you felt as badly as you did?

MR. PRICE: And it is perfectly clear that there was no doctor undertaking to make a diagnosis at that time.

THE COURT: No, it was the claim agent, and it was at his office.

MR. PRICE: All right.

By MR. PRICE:

Q. Is there the release in front of you?

A. I have it.

Q. What is the number on that, P-2?

A. Yes, sir.

Q. You read that release, before you signed it?

A. Yes, sir.

Q. And you understood what it said?

A. I did.

Q. You said you release the railroad of all claims and demands you had against the railroad for this accident?

A. That is right.

Q. You understood you were doing that?

A. That is right.

Q. Wasn't that right?

[67] A. That is right.

Q. Therefore, at the time you signed the release and took the money you intended to waive any further claim that you had against the railroad for this accident in consideration of their paying you $250.00?

A. That is what it said.

Q. And that is what it intended?

A. That is why I signed.

Q. You understood that is what it meant?

A. That is what it said.

Q. You understood that is what it said and that is what it meant?

A. That is right.

Q. How much money did you ask for when you first began talking settlement with Mr. Veidt?

A. I asked for my wages lost and doctors' bills.

Q. And how much was that?

THE COURT: Did you mention it?

MR. PRICE: Approximately?

THE WITNESS: I mentioned it at the time. I can't recall the exact amount of the doctor bills, but I said I should have between $300 and $350.

By MR. PRICE:

Q. You think it was something around that?

[68] A. That is right.

Q. That is the amount you wanted to get paid for this accident of yours?

A. That is right.

Q. If you had been paid that you would have been perfectly satisfied?

A. I thought I would be able to go back to work in a week or so and everything would be all right.

Q. Had you continued improving any from the time of your accident until the time that you signed this release?

A. I didn't.

Q. It was the same. When did you first feel badly, how soon after this accident?

A. It hurt the time it happened.

Q. The same day?

A. And I just thought it was a small sprain and a little liniment could fix it up and I went about my work.

Q. How soon did it disable you?

A. I didn't feel very good the next trip, that is two days later, or a day and a half later from the time I got back, two days from the date of the accident.

Q. What was the date of the accident?

A. I said it was the 14th of December.

Q. How did you fix this date?

[69] THE COURT: 1945?

THE WITNESS: 1944.

By MR. PRICE:

Q. How do you fix that date?

A. Well, that is just the time I had in my time book.

Q. What is that?

A. I had it in the time book.

Q. Did you have the time book with you?

A. I haven't.

Q. Where is your time book?

A. I don't know.

Q. When did you last look at the time book and pick that out?

A. When I got home I told my wife about it, and I knew we discussed it then.

Q. Obviously, you know it was a day or two later. I am talking now about your present testimony—when did you first fix in your mind that it was December 14?

A. It happened on a certain day, and you ought to know; you are right with it.

THE COURT: For the information of counsel and everybody I have the calendar here for 1944, and it shows that December 14 was on a Wednesday. Maybe that may help fix the date.

[70] By MR. PRICE:

Q. Well, the best information you have, it was December 14; are you sure about that?

A. As sure as I am alive I would say December 14.

Q. You are sure?

A. I am sure of it.

Q. And on the next trip which was about the 16th, you said you didn't feel very well?

A. I didn't come back after that trip; I stayed home.

Q. You did not report for it at all?

A. That is right.

Q. When was the next trip you did return?

A. The trip following.

Q. And what was that?

A. That is the trip I went on the 19th, and reported off at Toledo.

Q. The 19th of December?

A. That is right.

Q. So that between the 14th and 19th you made no trips?

A. I made one trip. I missed the trip following, and then I took the next trip out.

Q. Between the 14th and 19th you made no trip?

A. That is right.

Q. But you did go out on the 19th?

A. That is right.

[71] Q. And the trip on the 19th is the first trip you made after the accident?

A. That is right.

Q. And after that you made no more trips?

A. That is right.

Q. You said something about reporting this accident to your conductor; when did you first report it to the conductor?

A. That was on the 19th when we got into Toledo. We pulled in on the cabin track, at the engine house.

Q. Although this accident happened on the 14th, the first time you gave it to the conductor was on the 19th?

A. That is right.

Q. Did you give it to anybody else?

A. Only to my wife.

Q. You had not said anything about it to any of the crew?

A. I did not.

Q. You didn't mention it to anybody at the time?

A. I did not.

Q. After this accident you were the one who released the brakes on the cars, is that right?

A. That is right.

Q. How many cars did you have brakes on?

A. I believe it was six cars with brakes on.

Q. And how did you get on your cars?

[72] A. I had to climb over the first car and walk over the top of the other freights.

Q. You walked over the tops of the other cars?

A. That is right.

Q. And released the brakes?

A. That is right.

Q. And how did you get to the dog house?

A. I walked back over the top of the cars and got down on the first car and onto the tank of the engine and climbed up the ladder.

Q. Did you step or climb?

A. You had to step down and get on the stirrup; there is no footboard on the J-1 engine.

Q. You had to step down from the freight?

A. Yes, sir.

Q. And then you rode with the crew up to some other place?

A. To Conway.

Q. During that trip you didn't say anything about your accident?

A. I did not.

Q. How much longer were you with that crew on that day?

A. I don't recall what time we came into Conway, I would say sometime in the afternoon.

Q. And then you were through and you left the train there?

[73] A. That is right.

Q. And came back?

A. With the engine back to the pit or engine house, and I was relieved.

Q. You rode back?

A. We brought the engine back.

Q. And you rode back on the engine. When you came back on the engine was the entire crew with you?

A. No.

Q. How much of the crew came with you?

A. I was the only one. The conductor and flagman had dropped off; the conductor dropped off at the yard office, and I don't know whether the flagman stayed in the cabin or——

Q. And home is where—Conway or where?

A. At Conway.

Q. When you first reported this accident to the conductor, what was it you told him?

A. I told him I got hurt.

Q. How did you tell him you got hurt?

A. I got hurt back there at the crossing.

Q. Didn't you tell him that you twisted your back throwing a derail?

A. I did not.

Q. When he asked you where you had been on the last trip [74] when you missed, didn't you tell him that you had been snowed up for two days and couldn't get out?

A. I did not.

Q. Was anything at all said about shoveling snow?

A. I didn't.

Q. There was nothing said about being snowed up in your garage, and you couldn't get the car out?

A. I didn't.

Q. When you say you went to see Mr. Veidt, did you say you went there in response to an instruction from Mr. Richard?

A. That is right.

Q. And what kind of contact did you have with Mr. Veidt after Richard told you to see him?

A. He sent me a letter; I got a letter from him. I had written to Mr. Richard, and he wrote to me and said he had no recollection of it, but if it happened on the Toledo division I would have to get in touch with Veidt.

Q. You mean you wrote to Richard?

A. That is right.

Q. And he wrote to you in reply?

A. That is right.

Q. You didn't have a telephone conversation—it was by letter?

A. That is right.

[75] Q. Have you got Mr. Richard's letter?

A. I have not.

Q. Is it in existence, or did you destroy it?

A. It must have been lost when I moved.

Q. After you got the letter from Richard, what did you do?

A. I wrote to Mr. Veidt.

Q. And did he reply?

A. He replied and told me to go on a certain train, and I went on a certain train.

Q. You arranged with him by correspondence?

A. That is right.

Q. Did he ask you at that time to bring a report from your doctor as to your condition?

A. I don't recall.

MR. PRICE: If you will mark that——

(The document referred to, entitled "Physician's report of personal injury," dated February 13, 1945, was marked as Defendant's Exhibit 3 for identification.)

By MR. PRICE:

Q. I show you a paper marked Defendant's Exhibit 3, and ask you if that refreshes your recollection on that subject?

A. That is right, I recall that.

Q. Then he did ask you to get a report from your doctor?

A. That is right.

[76] Q. And that is the report marked Defendant's Exhibit 3 that you brought to him from your doctor?

A. That is right.

Q. Now, when you saw Veidt, what was it he said—he told you about going to Chicago, I didn't get that.

A. Well, we came back from the X-ray and he asked what I wanted. I told him I wanted my wages and enough money to cover my doctor bills. He told me he couldn't allow me that much. I said, "Well, I ought to have that." He said, "If you want any more than that"—I forget the man's name, the chief claim agent in Chicago for the Western Region, his name slipped my memory—he told me I would have to see him. He said, "You might have to wait several months to see him"—he didn't know——

Q. You might have to wait several months to see the claim agent?

A. You can never tell when the fellow isn't in the office, and I couldn't afford to wait.

Q. That is what he told you, that you might have to wait to see the claim agent?.

A. That is right, you can't tell when you could find him in the office.

Q. What is the name of the company you are working for now?

A. National Electric Products Corporation.

[77] Q. And where is that?

A. 14th and Deiss Avenue, Ambridge, Pennsylvania.

Q. How far is that from where you live?

A. Well, I live in Beaver Falls, and I commute by bus.

Q. How far away is it?

A. That is about 11 miles.

Q. Seven miles?

A. Eleven.

Q. And you go there by bus every day?

A. That is right, just about.

Q. Was that the first job you tried to get after you started to go back to work?

A. No, I tried a couple others but I couldn't do it.

Q. Which others did you try, and when?

A. Oh, I can't recall—I can't recall when I tried. I tried a job I just couldn't handle.

THE COURT: Can you tell us the firm?

THE WITNESS: The Butler Motor Transportation; they would give me a job driving. I said I couldn't handle a driving job, and they said, "What can you do?" I said I used to do a little work on cars, and they said how about mechanic? They gave me a job filling buses and things like that.

By MR. PRICE:

[78] Q. How long did you keep that?

A. I think a week or maybe two weeks.

Q. Where are they located?

A. In Butler, Pennsylvania.

Q. And what is the name of that company?

A. The Butler Motor Transit Corporation.

By THE COURT:

Q. You were there a week—why did you leave?

A. They had another fellow coming in that could do that mechanical work. They wanted a couple to work the job together, and I couldn't do it. I couldn't crawl under the buses.

MR. RICHTER: You couldn't do what?

THE WITNESS: Crawl under the buses,—a mechanic.

By MR. PRICE:

Q. And what was the next one?

A. The Heckett Corporation. My brother got me a job and I tried it, but I could only do it for about a week.

Q. And what was that?

A. I was supposed to help load bulldozers on cars.

Q. What was the name of the company?

A. The Heckett Corporation.

Q. And where are they located?

[79] A. In Butler.

Q. These are the only two that you tried to work for before you went to your present job?

A. That is right.

Q. Do you recall when it was you worked for them, for those two?

A. Those were the two jobs I had.

Q. I know, but do you know what time of the year it was that you worked for them?

A. No, I don't know the time.

Q. Do you know the month?

A. The one was the latter part of September.

Q. 1945?

A. 1945.

Q. Just before you got this other job?

A. That is right.

Q. And then you had this present job ever since?

A. Since the 19th of October.

Q. And you say your pay there is $35.00?

A. Just about that, if you get full time.

By The Court:

Q. What is the hourly rate?

A. At that time it was 78½ cents an hour.

Q. 78½ cents?

[80] A. Of course, since this raise came with the increase in wages of 18½ cents, it was raised to 99 cents. That is, I believe, the first of April.

By Mr. Price:

Q. You said that you were at Mr. Veidt's office and gave him a statement,—that is the statement you have in front of you?

A. That is it.

Q. And after you left his office and signed a release and got the check for $250, you gave someone else a statement?

A. I don't recall giving a statement to anyone else.

Q. See if I can refresh your recollection on that.—— Look in your file September 5, Mr. Richter; I sent you copies of both of these.

MR. RICHTER: I don't have it—do you have the letter showing you sent it to me?

MR. PRICE: If you will mark this.

(The carbon copy of the statement referred to dated February 14, 1945, was marked as Defendant's Exhibit 4 for identification.)

By MR. PRICE:

Q. I show you a carbon copy of a statement signed on the last page, and ask you if that is your signature?—is that your signature?

[81] A. That is my signature.

Q. All right. Do you remember that you gave that statement now that I have shown it to you?

A. I don't recall it yet. It is my signature, I know that.

By THE COURT:

Q. Do you know where you went when you put your signature on there?

A. That is right, I recall it was before the freight trainmaster in Toledo, Ohio; I believe that is the place.

MR. PRICE: That is February 14, 1945.

By THE COURT:

Q. Did you go in and give them a statement, or did they ask you——

A. They asked me to come in and see the freight trainmaster.

Q. After you had gotten this check for $250.00?

A. That is right.

Q. Sometime afterward?

A. That is right.

Q. Had you begun suit at that time?

A. No, sir.

Q. You had not begun suit?

A. No, sir.

By Mr. Price:

Q. How long was it after you had gotten the check and [82] signed the release?

A. I haven't read it, if this is the one I think it is, it was taken right after I left Mr. Veidt's, and was told to go to the passenger station to see the superintendent.

Q. It was immediately afterward, the same day?

A. That is right, the same day, before I got my train home.

Mr. Price: I now have the original of this, and I can give you the first copy instead of the carbon.

The Court: See if we get that right.

By The Court:

Q. Mr. Callen, you say the same day you got the check for $250.00 and signed the release, this statement was made,—it was part of the same transaction?

A. That is right. I went to see the superintendent at the Pennsylvania Station. Mr. Veidt's office isn't in the station, it is in the freight station, and I had to go to the passenger station to make this statement.

By Mr. Price:

Q. Mr. Veidt wasn't there when this statement was made?

A. No, sir.

Mr. Price: I will substitute this ribbon copy instead of the carbon, with Your Honor's permission?

The Court: All right.

(The original copy of the statement referred [83] to, dated February 14, 1945, was marked as Defendant's Exhibit 4, and the carbon copy thereof withdrawn.)

THE WITNESS: Yes, sir.

By MR. PRICE:

Q. Now, this statement, marked Defendant's Exhibit 4, was made by you in the trainmaster's office?

A. That is right.

Q. And Mr. Veidt wasn't present?

A. No, sir.

Q. Do you remember who was present?

A. I couldn't say.

Q. All right. Will you just read over that statement and let me know if that is what you told him at that time?

THE COURT: Do you mind if he answers this at 2:00 o'clock this afternoon. He will want to read it through and look at it.

MR. PRICE: I think he might sit here and read it, and answer when he comes back.

THE COURT: He says this is his signature; let him read it, and we will resume your testimony at 2:00 o'clock. Take as much time as you want.

Members of the jury, don't discuss the case during lunchtime. You wil have enough time to discuss it later on.

[84] (Whereupon at 12:45 o'clock a recess was taken to 2:00 o'clock P. M.)

AFTER RECESS.

(Present: Counsel as heretofore noted.)

RUDY E. CALLEN, recalled:

CROSS-EXAMINATION (Continued).

THE COURT: Ready, Mr. Price?

By MR. PRICE:

Q. Mr. Callen, I think I had asked you before recess to look at this statement that you made to the trainmaster just after you left Mr. Veidt's office?

A. That is right.

Q. Since that time have you read it?

A. Yes, sir.

Q. Do you remember making that statement?

A. Yes, sir.

Q. And you signed it after it was written?

A. That is correct.

Q. It was correct, was it?

A. That is why I gave it.

[85] Q. Do you remember in that statement——

Will Your Honor indulge me just a moment?

THE COURT: Yes, sir.

By MR. PRICE:

Q. You were asked after the accident you said anything to the engine man and you said "no, because that's the way he always does."

A. That is right.

Q. Did you mean that?

A. I mean that, just as it said there.

THE COURT: What is the question? Will you make that a little bit plainer?

THE WITNESS: I meant it just as I said.

By MR. PRICE:

Q. Had you been with that engine man before?

A. I had.

Q. Who was it?

A. At that time Mr. Brock.

Q. Mr. Brock was on the engine?

A. He was the regular engineer.

Q. The regular engineer?

A. That is right.

Q. Didn't you know that it was a pilot engineer that was running the engine?

[86] A. My recollection, it was Mr. Brock at the time.

Q. You testified this morning that the pilot engineer was running the engine?

A. That is what came out later.

Q. Didn't you testify that way this morning?

A. That is right, because—may I explain that question?

THE COURT: Yes, go ahead.

THE WITNESS: The reason, according to my statement at the beginning, it was December 14, and on December 14 it was the regular engineer; but, at the hearing later they said it was December 10. December 10 had a pilot. I was talking with the pilot on December 10, that was running the engine at that time.

THE COURT: What was the correct date? Do you know the correct date of the accident? Do you know, Mr. Callen?

THE WITNESS: According to my time book it was December 14.

THE COURT: According to your time book it was December 14. We understood you to say in some conversation later on that a pilot was mentioned, and you thought it might be December 10 because at that time a pilot was on the engine?

THE WITNESS: That is right.

[87] THE COURT: There was no pilot on the engine on December 14?

THE WITNESS: According to my own time there was no pilot on on the 14th, but it came out later that this was supposed to have been on December 10. December 10, according to the company's records, had a pilot, and I took it for granted I might have been wrong, but I still stick to my date of December 14.

By MR. PRICE:

Q. But you didn't tell us anything about that this morning when you were asked whether there was a pilot on the engine or not.

A. The statement made by me, there was a pilot on the engine.

Q. But, this morning when you were answering your own lawyer's questions you said it was a pilot running the engine?

A. That is what the statement says,—that is what it is.

Q. That is what you testified to?

A. All right.

Q. Didn't you? Don't you remember testifying that way this morning?

THE COURT: What way?

MR. PRICE: That there was a pilot running the engine on that day in question.

[88] THE COURT: I think he said the engineer didn't have a full engineer's license and there was a pilot on the engine with him.

MR. RICHTER: No, he was running it.

By MR. PRICE:

Q. Didn't you say the pilot was running the engine when you testified this morning?

MR. RICHTER: No, he said there was a pilot on the engine but he didn't say who was running it.

THE COURT: The question asked him wasn't whether the pilot was running the engine—if there is any doubt about it, we will have the reporter read that for you, so that we all understand it.

(The reporter read as follows:

"By MR. RICHTER:

Q. Will you tell us what members of the crew there were? There was a conductor——

A. Coming back we had a conductor; I was front brakeman, we had a flagman, that is the train crew; and then there was the engineer and fireman, and as our engineer wasn't qualified he had another man as pilot.

Q. When you say he wasn't qualified, you mean he wasn't qualified in that territory?

A. On that division.

[89] Q. And so the railroad put what they call a pilot on there?

A. That is right.

Q. This pilot controlled the operation of the engine in a certain specified territory?

A. Toledo Junction,—he got off at Mansfield, because that is the junction point.")

By MR. PRICE:

Q. All right, you were talking about the pilot. Was the pilot running the engine or not?

A. I don't know when we came back, I don't know.

Q. You don't know who was running the engine?

A. I do not.

Q. Although you were riding on the engine?

A. I was riding on the rear of the tank.

Q. Would you mind looking at me?——

A. I am looking at you.

Q. You didn't know, and didn't see who was running the engine?

A. I didn't see who it was.

By THE COURT:

Q. Were you in the dog house, as you call it, or on the stirrup?

A. I was on the stirrup before the coupling was made.

[90] Q. Tell the jury where the stirrup is.

A. The stirrup is the only rung on the back of the tank of the engine,—it is on the side, not on the end, on the right-hand side where I could see the engineer.

Q. On the rear of the tank?

A. On the rear of the tank.

By MR. PRICE:

Q. Where you could see the engineer? Could you see who it was?

A. This is a long engine, and you can't always tell.

Q. How far was it from you to the engineer's cab?

A. I never got the measurement of that tank.

Q. Approximately?

By THE COURT:

Q. What were you doing on the stirrup? What was your purpose? You told us about it this morning, but better repeat it right now.

A. My job was to be there on the stirrup of the tank,—that was my job, and I had to do my work.

Q. What particular work at that particular time?

A. We were there when we came to the crossing and the cars to see that they couple. When the cars couple you connect the air hoses that connects the brakes so that the engineer can operate the brakes on the train from the engine [91] cab.

Q. And you said something about watching out for signals. What did you mean by that at the time?

A. Well, the brakeman, you see, stands on the end of the tank of the engine——

Q. At the end, or the rear?

A. At the end of the tank; that is right where the work is to be going on, and so he is the one who gives signals to

the engineer. That is why he is back there. That is his right place.

THE COURT: All right, go ahead.

By MR. PRICE:

Q. Now, approximately how far were you from the engine cab when you were riding on the rear of the tank?

A. Around 50 or 60 feet.

Q. How much?

A. I suppose around 50 or 60 feet; it is a long tank.

Q. You think the tank was 50 or 60 feet long?

A. It is a pretty long tank,—I didn't measure it.

Q. And you couldn't recognize who the engineer was at that time?

A. You can't always tell the pilot there; he has his hat down over his eyes, and wears goggles, and you can't always recognize who it is.

[92] Q. Could you in this case?

A. I couldn't.

Q. You thought Mr. Brock was the engine man there?

A. I took it that he was.

Q. He was the regular engine man?

A. That is right, on that line.

Q. On the 10th or on the 14th?

A. On the 14th.

Q. Not on the 10th?

A. That is what I understand the record shows, he wasn't on that run on the 10th.

Q. Do you know who was on that run on the 10th?

A. I believe the—I knew the name, but I can't recall it right now.

Q. I didn't hear you.

A. I can't recall now.

Q. Do you know the name of anybody who was on the run on the 10th?

A. Will you repeat that?

Q. Do you know the name of anybody who was on the run on the 10th?

A. No,—my regular crew, Mr. Crum, and Mr. Almond was the brakeman,—Mr. Crum was conductor.

Q. Crum was conductor. When a pilot is necessary on an [93] engine that means that he has to run the engine?

A. I don't know the pilot rules of the engine men.

Q. How many times have you seen a pilot when you have been on a train?

A. A number of times.

Q. Didn't you know they have to be there because they are qualified and the regular engine man isn't qualified for that particular territory?

A. That is right.

Q. And the pilot had to run the engine because the regular engine man isn't qualified?

A. He is supposed to be in the cab.

Q. Didn't you know who runs the engine then?

A. I never read the enginemen rules——

Q. Why do you hedge? I am asking you as a railroad man who is experienced and seen pilots and several engines——.

MR. RICHTER: There is no question about hedging. If you want to ask questions, let's ask them.

MR. PRICE: But if he doesn't answer——

By MR. PRICE:

Q. You didn't know that the pilot had to run the engine,—that is why he is on the engine——

THE COURT: Wait a minute. I understand what you want to know is who was there running the engine, and [94] not what the rules require. He says he doesn't know the rules. The rules might be one thing, and they might have been observed. I don't know what the rules have to do with it, and if he doesn't know the rules——

MR. PRICE: I wasn't asking about the rules. This is purely a question of credibility. This is a railroad man who is familiar with the practice of having a pilot, and he says he doesn't know that it is the pilot's job to run the engine. That is a very important factor in this case, bearing on the question of credibility.

THE COURT: Very good.

By MR. PRICE:

Q. Will you tell us whether or not you know the pilot is the one who has to run the engine because of the non-qualification of the regular engineer?

A. I will say this: That usually the engine is run by the pilot in foreign territory where the engineer is not qualified, but as to the exact rule, I don't know.

Q. I didn't ask about the rules. I asked whether you knew that that wasn't the practice.

A. That is the practice.

Q. Did you know that it was against the rules of the company to go down the back end of a tank when the engine was moving backwards?

[95] A. I didn't know that.

Q. Let me show you the rule on that subject——

THE COURT: Read the rule.

MR. PRICE: Rule 1429 of the safety rules, train, engine and other transportation employees.

By MR. PRICE:

Q. That is the rule book that covers your operation?

A. That is right.

Q. "Ascending or descending end ladder of engine tender while engine is moving backwards, is prohibited."

THE COURT: Will you read that again?

MR. PRICE: "Ascending or descending end ladder of engine tender while engine is moving backwards, is prohibited."

MR. RICHTER: If Your Honor please——

THE COURT: This was a train cut in half—this was more than an engine—and they were backing up——

MR. PRICE: No, sir, they were not; this was only *the engine.*

THE COURT: There is another rule where a train is cut in half. Eighty trains, unable to make the grade, and the train was cut in half as nearly as possible, and transported in sections—whether that comes within the rule, I don't know. Is there another rule on this subject? [96] This relates to an engine backing and shifting in the yard. I guess the railroad men know the rule. What rule applies in this case, I don't know.

MR. PRICE: May I note my objection to Your Honor's interpretation as to the application of this rule.

THE COURT: It isn't an interpretation, but you are taking one rule out of many rules in railroad yard operation. I am asking if there is any other rule on the subject because the rule you have quoted doesn't apply entirely, possibly, to this one phase of the question. I am asking if there is any other rule covering the circumstances of this particular train operation. I made no interpretation, and I would ask that you withdraw that remark; the jury is going to interpret it finally.

MR. PRICE: Your Honor said it applied in the yard, possibly.

THE COURT: I said it possibly does—I don't know. The rule you have read speaks about the moving of an engine, but here is an engine with half a train on it.

MR. PRICE: No, sir; this is an engine without any cars on it.

THE COURT: Cutting the train in half is an operation out on the road.

MR. PRICE: Yes, sir, but when this man says [97] he got hurt the engine was moving without any cars attached to it. It was backing up without any cars attached to it, and that is why I asked about this rule.

THE COURT: Ask him about it, and maybe you will want to ask more questions about this particular train operation.

MR. RICHTER: I will show the rules that really apply. I have them here.

THE COURT: Go ahead.

By MR. PRICE:

Q. Mr. Callen, you are familiar with that rule——

A. Yes, sir.

Q. About this particular movement?

MR. RICHTER: Will you identify what book it is, so we may know what book you are reading from?

MR. PRICE: I read it to the reporter a moment ago. The title was "Safety Rules—Train, Engine and other transportation employees."

Mr. Callen said that was the rule book that applied to his operation.

By MR. PRICE:

Q. This movement on which you say you were injured was a movement of an engine alone without any cars attached?

A. Engine and tank.

[98] Q. But there were no cars?

A. No cars other than the tank.

Q. And that is a part of the engine equipment?

MR. RICHTER: No, that's a car.

MR. PRICE: Why? It is one unit.

MR. RICHTER: I don't want you to shove in any answers that are not correct. It is a car.

MR. PRICE: The engine and tanks go together always?

THE WITNESS: Usually they are together——

By MR. PRICE:

Q. The engine can't operate without a tank.

MR. RICHTER: Let him finish. They are usually together, and what else?

THE WITNESS: They are usually together, but they are not considered a distinct unit.

By MR. PRICE:

Q. Can the engine operate without the tank?

A. Not very handy.

Q. Can it at all—why didn't you answer that? Don't you know that it can't?

A. Not on the railroad, no.

Q. Of course not. Because the tank carries the coal and the water?

[99] A. That is right.

Q. And the engine cannot operate without coal and water?

A. No.

THE COURT: Now, you are quibbling, gentlemen; I must say.

MR. PRICE: That was my objection.

THE COURT: Asking if an engine can operate without the tank, and the witness says not for very long. Do you mean to say that the engine couldn't operate at all without the tank which carries the coal and water to replenish it from time to time? If he means to say it couldn't operate in transporting or hauling its load of freight in the regular way without a tank, that is one thing; but to say it cannot be operated, moved or

worked at all—we are just quibbling. Let us get this thing straight. This is not a stationary engine, a locomotive isn't a stationary engine—and if you will ask him what you really want to get at—go ahead, Mr. Price.

By Mr. Price:

Q. This rule 1429 says that "ascending or descending end ladder of engine tender while engine is moving backwards is prohibited." You did that? You descended the end ladder of the engine tank while the engine was moving backward?

[100] A. I did.

Q. And you violated this rule in doing so?

A. That is right.

By The Court:

Q. Were you hurt while ascending or descending that ladder, or were you hurt by jumping from the stirrup?

A. I was hurt on the stirrup.

Q. How long was it before you descended that ladder and got on the stirrup?

A. It was probably about 500 feet, approximately ten car lengths I got down there before I jumped.

The Court: All right.

By Mr. Price:

Q. In this statement that we have been speaking about, you said that you understood you "should have remained on the top of the tender in your original position until the engine came to rest and in this manner I would not have been injured as I was." You said that?

A. That is right.

Q. And you also said in that statement when you were asked about the X-ray pictures, you said you had not received the report yet, didn't you?

A. That is right.

Q. This statement was made after your conversation with [101] Mr. Veidt in his office?

A. That is right.

Q. Now, in that statement given to Mr. Veidt you said that you figured the engine was going slow enough so that you could retain your balance all right when you got off?

A. That is right.

Q. And you said, "Judge engine was moving at a moderately fast walking pace when I dropped off." Didn't you?

A. That is what I said there.

Q. That is what you said. Then, why did you say today it was going at least six miles an hour?

A. This is a fast walking pace.

Q. You know you can't walk six miles an hour?

A. I can't, no.

Q. Don't you know you never could walk six miles an hour?

A. I can walk pretty fast.

Q. Don't you know that no ordinary person can walk over four miles an hour maximum?

MR. RICHTER: I don't know by what authority Mr. Price derives that conclusion. Different people walk at different speeds, and I object to this line of cross-examination.

THE COURT: I think that Mr. Price is within the scope of proper cross-examination. I will overrule your [102] objection.

MR. PRICE: If you will answer the question.

THE WITNESS: What is the question?

(The reporter read the question as above recorded.)

THE WITNESS: The average person does not.

By MR. PRICE:

Q. And then you said that you had——

THE COURT: Wait a minute. You are coming down in my territory now. Mr. Price, whoever told you they

couldn't walk more than four miles an hour didn't give you the right information. They can walk more than that. If you take the heel and toe walk—I walk more than four miles an hour for a long period of time, and I do it now. Don't get off on the wrong track.

MR. PRICE: Your Honor is a professional in that field, not an amateur.

THE COURT: Four miles is pretty good; you got to step pretty brisk. Four miles an hour is a good pace. I think that is a hundred and twenty or a hundred and thirty steps to the minute, and with a thirty-five or thirty-six inch step—110 is the military step, but that is not the full pace.

Can we all agree that four miles an hour is [103] a good walk at any time?

MR. PRICE: That is even more than a moderate pace.

THE COURT: All right. Go ahead.

By MR. PRICE:

Q. You said that you dropped off cars and engines many times moving fast, and considerably faster?

A. That is right.

Q. So that the speed of this engine when you dropped off was nothing unusual in your experience in alighting from moving cars and engines, was it?

A. The difference was that it is altogether different from dropping off the rear of an engine when it is going and dropping off the front end.

Q. You didn't say anything about that in your statement?

A. I didn't enlarge on it, no, I didn't.

Q. All you said was that you had stepped off "dropped or stepped off of cars and engines many times moving that fast and considerably faster." You said that?

A. That is what I said.

Q. And then you say, "My left foot may have landed on some ice on the crossing." That is what you said you were not sure whether that is what caused you to slip or not?

A. I don't know, I just pumped.

[104] Q. You didn't know what it was that caused you to slip?

A. That is right.

Q. Was there snow or ice on the crossing?

A. I didn't notice.

Q. You didn't notice whether there there was any snow or ice there?

A. I didn't notice.

Q. You didn't fall?

A. I didn't fall.

Q. As far as the speed of the engine was concerned that didn't have anything to do with your falling or twisting yourself, did it?

A. Just the jumping, that's all.

Q. Something that might have been on the crossing when you lit on it caused you to twist your back?

A. I didn't say that—it could have been—I don't know. I didn't notice anything on the crossing.

Q. Would it be fair to say that you didn't know what it was that made you twist your back?

A. I could say that—I don't know exactly; I just jumped.

Q. Now, before you went to see Mr. Veidt you wrote him a letter?

A. That is right.

Q. Do you remember what you said in that letter?

[105] A. I don't recall.

Q. Do you remember saying that you stepped off the stirrup at the crossing and "I somehow slipped and twisted my back"?

A. I don't recall those words.

Q. But that would be true, would it not?

A. The former statement would make it that way.

Q. Did you also tell him at that time or in that letter, that your osteopath or chiropractor, rather, had advised you to get off that kind of work, the railroad work, because of your back?

A. I don't know; he may have said that.

Q. Do you remember saying that to Mr. Veidt?

A. I do not.

Q. Do you remember the doctor saying that to you?

A. I don't recall it just now.

MR. PRICE: That is all.

RE-DIRECT EXAMINATION.

By MR. RICHTER:

Q. Mr. Price picked up individual lines from this statement—I will ask for the original of this statement. Do you have it there, Mr. Price?

THE COURT: Have you finished your cross-examination, Mr. Price?

MR. PRICE: Yes, sir.

[106] By MR. RICHTER:

Q. And ask you whether or not you didn't, when you came to Mr. Veidt, say this to him when you made this statement:

"We had made the cut of our train at a road crossing. I am pretty sure this was the first road crossing west of Vernon Tower, about a mile or two west of the Tower. As our engine was backing towards the rear portion of our train, I was riding up in the shelter cabin (dog house) on the back end of engine tank. Then as we got near to our cars, I climbed down the ladder on the back end of engine tank and got down on the stirrup on rear end of the tank on the engineman's side. It was my job to couple the engine onto rear portion of train and connect the air hoses. As we got near the

cars, I figured that the engine was moving too fast and would hit the cars with a bang. I therefore dropped down off the stirrup before the engine coupled to the standing cars, which had air in them and wouldn't give much when struck by the engine."

You told Mr. Veidt that at the time?

A. That is right.

Q. That is the statement which was made a short time after the accident? It was made the same time Mr. Price pulled the sentence out of the statement that he read? In this [107] other statement you told the trainmaster you thought the train was coming back too fast, and then he asked you this question:

"When you say that the engine was running too fast, do you mean that you thought that the engine would collide with the front end of the rear portion of the train?" And your answer was, "Yes, sir."

And the next question:

"Did the engine collide with the front end of the rear of the train?"

And the answer:

"He hit it pretty hard, but didn't do any damage."

You told both Mr. Veidt and the trainmaster the same thing exactly as you told here in court, is that correct?

A. That is right.

Q. And that is all in these statements?

A. That is right.

Q. Now, so that the jury will understand, is there a difference between the train crew and the engine crew?

A. There is.

Q. To what crew did you belong?

A. I belonged to the train crew.

Q. Who are the ordinary members of a train crew?

[108] A. The conductor and two brakemen,—a front brakeman and a rear brakeman, who rides in the cabin with the conductor.

The rear brakeman is called a flagman.

Q. As a matter of fact, the train crew belonged to a different lodge and union——

A. That is right.

MR. PRICE: That is objected to.

By MR. RICHTER:

Q. —than the engine crew?

MR. PRICE: That is objected to as being utterly immaterial what union they belong to.

MR. RICHTER: I will withdraw the question.

THE COURT: You withdraw that?

MR. RICHTER: All right.

THE COURT: They are different units?

MR. RICHTER: They are different units.

THE COURT: All right.

By MR. RICHTER:

Q. And the engine crew consists of who?

A. The engineer and fireman.

Q. Did you have anything to do with how the engine should be operated inside the engine itself?

A. I did not.

[109] Q. Other than that they are supposed to respond to the signals that you give?

A. That is right.

Q. There was some talk about rules. Now, the rule that you were shown is the general safety rule?

A. That is right.

Q. Will you turn to rule 103——

MR. RICHTER: May I have this marked for identification.

(The rule book referred to was marked as Plaintiff's Exhibit 5 for identification.)

By Mr. Richter:

Q. Rule 103, of the Pennsylvania, known as the operating rules,—you are familiar with this book?

A. Yes, sir.

Q. If you will read it for the benefit of the jury, rule 103.

The Court: You read it.

Mr. Richter: I will read it,—this is rule 103:

"When cars are pushed by an engine and the conditions require, a trainman must take a conspicuous position on the leading car; under such circumstances if signals from the trainmen cannot be received by the engine crew, [110] the movement must be stopped immediately unless a brake valve and an alarm whistle on the leading car are being used."

The Court: Will you read that last line again?

Mr. Richter: "When cars are pushed by an engine and the conditions require, a trainman must take a conspicuous position on the leading car."

By Mr. Richter:

Q. Now, is a tender a car?

A. It is considered a car.

Q. When an engine is pushing a tender where is your proper position?

A. On the leading part—on the leading end.

Q. That is where you must be, where you can see what is going to take place?

A. That is right.

Mr. Richter: Now, I will read 103a:

"When a train is shifting over a public crossing at grade not protected by a watchman nor by gates, a member of the crew must protect the crossing in advance of each movement over the crossing unless otherwise provided."

By Mr. Richter:

Q. Was there any crossing watchman at this crossing?

[111] A. Not at that crossing,—he was in the tower.

Q. How far is it from the tower to the crossing?

A. I can't say offhand, a couple hundred feet, anyway.

Q. There was no man standing there with a sign to stop traffic?

A. No.

Q. And no gates at this crossing, or anything of the sort?

A. No, it was just a railroad crossing.

Mr. Price: I would like to note my objection to any reference to rule 103 and rule 103a, and move that the rules and testimony relating thereto be stricken out on the ground that they are inapplicable to the situation here.

Mr. Richter: We will produce an expert who will tell us whether they are applicable or not.

The Court: You introduced rule 32 or rule 52, was it?

Mr. Richter: 1052.

The Court: And I don't see how I could exclude the other two,—suppose we let them stand. I will take your objection and give you an exception, and then give you an opportunity to discuss it with the jury later on. I will let all three rules come in. If you desire you can bring in any of the rules so that the jury can have the whole thing.

Mr. Price: The rule that I offered was 1429.

[112] The Court: 1429. All right, Thank you.

Note the objection and the ruling thereon, please. Is there anything further?

Mr. Richter: One other question.

By MR. RICHTER:

Q. Mr. Price asked some questions as to why you couldn't see who was running the engine. Are you looking toward the engineer or ahead in the direction in which the engine is pushing the tender?

THE COURT: Not quite so fast. The shorthand writer has to get the questions and answers, and I can tell that you are a pretty hard man to report.

MR. RICHTER: Very well, I am sorry. I will try to go slower.

THE COURT: Put the brakes on a little.

By MR. RICHTER:

Q. You were standing on the stirrup of this tender?
A. That is right.
Q. And which way were you facing?
A. Facing the direction of travel.
Q. And therefore your back is where?
A. To the engineer.
Q. Am I correct in stating that it is your duty to watch [113] in the direction in which the movement is being made?
A. That is right.
Q. And it is the duty of the engineman to watch you for signals so that he will get the benefit of what you learn by your observation at the front?
A. That is right.

MR. RICHTER: That is all.

By THE COURT:

Q. Are you in a conspicuous situation for the engineer in that position?
A. That is right. I am supposed to give the signals.

By MR. RICHTER:

Q. Could you have possibly passed the signals to the engineer from the shelter house?
A. No.

Q. Can he ever see you in there?

A. No.

Q. And can you see him when you are in there?

A. No.

Q. Where is the only conspicuous position on the tender you can take where the engineer can see your signals?

A. The exact position I took.

Q. And where is that?

A. On the stirrup of the engineer's side on the tender.

[114] Mr. Richter: That is all.

Re-Cross-Examination.

By Mr. Price:

Q. You were asked about not being able to see the engineer,—were you looking at the engineer?

A. When I was on the stirrup I couldn't see who he was.

Q. At that time you were not looking forward but had turned around to the engineer?

A. When he didn't take my first signal, that is what I had reference to.

Q. Did you look back to see?

A. I looked back over my shoulder.

Q. And you think that rule 103 applies to this situation?

A. I would think so, yes.

Q. When did you get down on the stirrup?

A. I would say about ten car lengths from the crossing we were coming to, to pick up the other cars.

Q. How far had your engine gone before you got down on the stirrup?

A. From the crossing, when I was out passing signals to back over the Nickel Plate Crossing.

Q. And how long is that?

A. I don't know.

Q. A mile or two miles, or five miles?

[115] A. It isn't five miles, I know that.

Q. From the time your engine left the first cut of cars which you took over Tiro Hill until you got back to where you left the second half of the train, how far was that?

A. I don't know; it might have been a couple miles.

Q. You didn't ride on the stirrup that couple miles?

A. I did not.

Q. You didn't think that rule 103 required you to?

A. I didn't think of rule 103 when I was in the dog house.

Q. You didn't think there was any rule requiring you to ride that distance standing on the stirrup of the tender?

A. That is your job,—you don't think of individual rules when you are working on the railroad.

Q. You didn't think your job required you to stand on the stirrup that whole distance?

A. I got down to try to slow the engineer up. That is what I wanted there. I felt it my duty at that particular time and I got down.

Q. I asked you if there was any rule which required you to ride on the stirrup of the engine from the time you left the first cut of cars on top of the hill until you got back to the second half?

A. I repeat, we didn't think of the rules when you are in trouble like that.

[116] Q. Did you think there was any duty on your part to do that for that distance?

A. Your duty is to be on the job and take care of the job that you are assigned to.

Q. That is not what I asked you. Did you think it was your duty to ride on that stirrup for that whole distance?

A. I didn't ride the whole distance.

Q. I know you didn't. I am asking you whether you thought that that was your obligation?

A. I didn't need to ride the whole distance.

Q. Won't you answer the questions more specifically.

A. I am answering the best I can.

Q. I will ask you once more, did you think you had any obligation or duty to ride on the stirrup for that whole distance?

A. No.

Q. If the engine had been going forward would you have considered that there was any obligation for you to ride on the front of the engine?

A. No.

MR. PRICE: That is all.

MR. RICHTER: That is all, thank you.

By THE COURT:

Q. You mean because the engineer could have seen for [117] himself?

A. That is right; that is the way he is supposed to be looking.

By MR. PRICE:

Q. Can he see just as well in the back as he could in the front of the engine when there were no cars on it?

A. He couldn't see the same because he is straining himself and twisting himself in a position so that he is uncomfortable.

Q. He is uncomfortable?

A. Well, I would be.

Q. And you think he is uncomfortable?

A. Not necessarily; I take that word back exactly as I said it, but he has to put himself in a different position than when he is looking straight ahead.

Q. He is just supposed to be looking straight ahead?

A. That is right.

Q. He has about the same distance from the end of the tank as he has to the front end of the boiler?

A. That is right, in the J-1.

Q. He is about in the middle of the operation?

A. That is right.

Q. And the coupler on the front of the engine is about the same distance as the coupler on the rear end of the tank?

A. That is right.

[118] RE-DIRECT EXAMINATION.

By MR. RICHTER:

Q. Except that he has the high tank on the back of the engine, and on the front he has the narrow nose of the engine?

A. That is right.

By THE COURT:

Q. This is a coal burner, this engine?

A. That is right.

MR. RICHTER: That is all, Mr. Callen.

MR. RICHTER: Mr. Rosser, will you come up here.

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[119] EVAN J. ROSSER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. RICHTER:

Q. Mr. Rosser, what is your business?

A. Assistant trainmaster, Reading Company.

Q. How long have you been in the railroad business?

A. Approximately 25 years.

Q. And what positions have you held in the railroad business?

A. I have been brakeman, safety instructor, conductor, and at the present time, assistant trainmaster.

Q. What does instructor job include?

A. Instructing new men, new employees, in the safe manner to perform their duties, obey the rules, and strictly comply with all the rules and principles of safety first.

Q. In the course of your duties have you had experience with other railroads, other than the Reading?

A. Yes.

Q. With what other railroads?

A. The D. R. G.; C. M. & St. P.; Big Four; Union Pacific; and the Reading.

Q. Did you hear the testimony in this case about the movement that was made?

[120] A. Yes, sir.

Q. You know that this engine was coming back light with the tender attached, coming backward down a hill to couple onto some cars that had been left standing, because they had been cut away from another group?

A. Yes.

Q. In returning backward, will you tell us, please, what the duty of a man in the position of Mr. Callen was, so that he could actually and properly perform that duty?

A. The duties in a case of this kind, under the operating book of rules, is for the front brakeman to be in a conspicuous place where he can be in position to govern the movement of the engine by passing signals to the engineer. That place would be on the step side or stirrup of the rear of the tender of the engine.

Q. What rule is that?

A. 103a and 103 of the operating rule book.

Q. Is that the rule, the same thing as the rule that was read?

A. That is practically the standard rule all over the United States.

Q. And that is the same rule that appears in the American Association of Railroads Rule Book?

A. That is correct.

[121] Q. Could Mr. Callen possibly have passed signals to the engineer if he had remained in the dog house or shelter box?

MR. PRICE: That is objected to.

MR. RICHTER: Could he physically have done so?

MR. PRICE: That is objected to.

THE COURT: He might want to qualify that for Mr. Rosser by the type of engine and the type of tender that was involved.

MR. RICHTER: This is a J-1 engine with a coal tender.

THE WITNESS: On a J-1 engine it would be impossible for the engineer to see a man standing on top of the tender,—the engineer would have to look over the apron, over the cab, and then he would not be in the proper position to operate his engine properly.

Q. As a matter of fact, coming backward, as this engine was coming, could the engineer get as good a view ahead if the engine is going backwards and he had to turn around and look in the direction in which he is pushing the engine?

A. Running with the tank first?

Q. Yes.

A. The only way he can see is on a line with the tank.

Q. Can he see what is within the line of the tracks [122] themselves?

THE COURT: You mean the line on the right-hand side of the tank?

THE WITNESS: He can only see directly in the line of the tank; there is a certain blind spot from where the engineer sits to the left side for a certain distance,—that all depends on the length of the tender.

THE COURT: This is the front of the engine, and this is the tender (indicating)——

THE WITNESS: Yes, sir.

By THE COURT:

Q. You mean that his view could only extend along the line of the right-hand side here (indicating)?

A. A certain space in back of the engine is what we call the blind spot; it is how far he can see, of course, to the left-hand rail (indicating).

Q. And is that the reason they have a brakeman on the stirrup?

A. That is right.

By Mr. Richter:

Q. That is so he can be the eyes of the engineer, is that correct?

A. That is right.

Q. And does his signalling control the movement of the [123] engine thereafter?

A. That is correct.

By The Court:

Q. And is it the duty of the engineer to obey these signals?

A. Absolutely.

By Mr. Richter:

Q. Suppose if the signalman, instead of being where he is supposed to be to pass these signals to the engineer, disappears from the sight of the engineer, what would happen?

A. The engineer is immediately supposed to come to a stop, under the rules.

Q. Mr. Rosser, what is the maximum speed at which a coupling between tank and engine should be undertaken with some cars, all standing and set with air on?

A. A coupling at all times to be made between engines and cars at a speed of approximately a mile or a mile and a half per hour.

Q. If it comes any faster, in your opinion, is it——

A. Any faster is liable to cause depredation to the equipment.

Q. Is that the rule of your Company?

A. No, that is the railroad—any railroad man knows that [124] to attempt to hit in excess of that speed may make the knuckles cross.

Q. And what does that mean?

A. Two knuckles come inside and you have to break the line and have to pick that car out and set it out.

Q. And you can't use it?

A. You can't use it,—it would be an interstate defect.

MR. RICHTER: Cross-examine.

CROSS-EXAMINATION.

By MR. PRICE:

Q. And that is something every railroad man would know?

A. That is correct.

Q. And an employee who has been any time on a railroad would not couple a length of cars going over a couple of miles an hour?

A. That is right.

Q. That is so fundamental that you would expect anybody having worked a month on the railroad would know?

A. That is right.

Q. Coupling at high speeds, you say, would damage the equipment?

A. It is possible, yes, sir.

Q. It is quite likely?

A. That is quite right.

[125] Q. You would expect some damage to equipment if you hit a standing string of cars that had their brakes on tight, at five or six miles an hour?

A. That is right.

Q. Are you a qualified engineman?

A. No, sir, I am a conductor.

Q. That is what I thought you said.

A. Yes, sir.

Q. Some railroad men are qualified in different phases, and I didn't know whether in your case——

A. I know some of the operations,—I can run an engine, but possibly I would not be able to pass the engineman's examination in order to receive a certificate as an engineman.

Q. You have never qualified?

A. As engineman?

Q. Yes.

A. No, sir.

Q. To run an engine?

A. No, sir.

Q. Have you ever ridden on one of the P. R. R. J-1 engines?

A. What is that?

Q. Have you ever ridden on one of the P. R. R. J-1 engines?

[126] A. No, I haven't ridden on them; I saw them, but have never ridden on them.

Q. Do you know how big they are?

A. Overall?

Q. Yes.

A. No, I wouldn't be able to say particularly.

Q. Do you know what view the engineman has both forward and backward?

A. No, I do not; I imagine it is the same size as a RT-1.

Q. And on the engine there is a blind spot both forward and behind, at the extreme front and rear of the engine?

A. That is right, but as far as the front, you have the brakemen and you have a man supposed to be on the left side at all times to watch, that is, the fireman.

Q. I am talking about the blind spots in any engine, particularly a big engine with a long tender or a long boiler——

A. The longer the blind spot or the bigger the blind spot.

Q. That is a common condition which exists, and everybody recognizes it, both in front and behind the engine?

A. That is correct.

Q. That is because, looking toward the front, the boiler is so long that it blocks the view of the engineman for a certain number of feet in front of the engine?

[127] A. That is absolutely correct.

Q. And as he looks beyond that blind spot he can see both tracks?

A. That is right.

Q. And the same thing applies to the rear, looking back?

A. That is right.

Q. And the length of the blind spot varies with various sized engines, depending on the size of the tank, the boiler and so on?

A. That is right.

Q. Did you say it was your opinion that rule 103 and 103a applied to light engine movements?

A. That is right.

Q. On a road movement, out on the road, would an engine that was running backward have a man standing on the stirrup?

A. I may answer that in this way, if you will: if you happen to have any depredation of company property the man would be called in in that case and charged with violation of the rules; if they did damage when the engine coupled to the car, that rule would apply, and the man would be disciplined because he wasn't there.

[128] Q. When you are making a road movement, when the engine is backing up——

A. I am referring to road movement when I made that remark.

Q. I am talking about a trip of two or three miles, not making a coupling,—would a man be riding on the rear end?

A. Is this engine going to be coupled to cars?

Q. He may couple or he may not couple, but during the movement itself, would you say that a man should ride on the stirrup?

A. If he is going back to couple up cars, that is where he belongs; if he is running light with no intention to couple, then the head brakeman doesn't belong there.

Q. If he was going to make a trip of two or three miles——

THE COURT: Wait a minute. What was that Mr. Price?

MR. PRICE: If he were going to make a trip of two or three miles, and then after making a trip of two or three miles he was going to make a coupling, should the man stand on the stirrup during that time?

THE COURT: Wait a minute. There is nothing in the testimony to that effect.

I think we can agree that Mr. Callen said [129] that about ten car lengths before he coupled, he came down from the dog house or shelter house to take his position on the stirrup. Two or three miles wasn't mentioned in that connection. If you want any verification of that,—I don't want you to trust to my memory,—that testimony is entirely for the jury,—but if you have any question about it, I will have the whole thing read back so that we will have no misunderstanding.

MR. PRICE: I have no question as to that—I was going to ask him to explain the meaning of the rule.

THE COURT: It was a hypothetical question?

MR. PRICE: That is all.

MR. RICHTER: I object, unless it is applicable here.

THE WITNESS: I will answer,—the same thing would apply here,—the brakeman shall go back a sufficient distance, and in this case the brakeman was riding at a particular distance to afford protection to the engine.

Q. Is there anything in the rules that requires this position that you described?

A. Other than the fact that the rule says that the man shall take a conspicuous place; it does not say for how long he shall ride back there or not.

[130] By THE COURT:

Q. That is within his discretion?

A. That is the discretion of the brakeman.

MR. RICHTER: Doesn't the rule say when conditions require it?

THE WITNESS: That is right.

By MR. PRICE:

Q. It is up to him to decide when he wants to do that or when he should do that?

A. Only in this way, and the companies take the attitude and rightly so, if any damage happens while he wasn't there, then he has violated that rule.

Q. But I am asking you when he should take that position,—that is up to him,—that is a matter he can control?

A. The rule says he shall take a conspicuous position, it doesn't say when the engine starts back or not——

Q. But it is up to him to decide when he should do it?

A. If anything should happen, as I said, before he got back there and there was any depredation, then he is charged with violating the rule because he isn't there, therefore, I say, as an expert, and as I instruct every man,—he is supposed to go on the back of the engine, whether it is one mile or ten.

Q. You would have a man ride ten miles on the stirrup of [131] the engine, is that right?

A. Yes,—and I have done it myself.

MR. PRICE: That is all.

MR. RICHTER: That is all, Mr. Rosser. Thank you.

THE COURT: Just one minute, Mr. Rosser. So that we will have no misunderstanding later on, I think we all agree riding ten miles on the stirrup of an engine

or tender seems rather large, but we can all visualize a case, probably, where the roadbed would make things uncertain, but what would be the general condition which would cause you to ride ten miles, a washout or for observation of the track or——

THE WITNESS: Running against other traffic.

By THE COURT:

Q. Whether or not the statement is rational or too general,—but, what do you mean?

A. Running against current traffic. It is quite often you have to run,—in which case you are issued a TD, or train order number 19, and you make a run between,—it all depends on the length between towers, from one tower to another—it may be one mile or it may be ten miles,—and it then becomes your duty as brakeman to place yourself [132] in a position, because you are going on this train order to run against the current of traffic,—you must be in position, because if some man slips at the other end and lets an engine in——

Q. You mean running on the left-hand track instead of the right-hand track?

A. That is right.

Q. And a train might come in the opposite direction?

A. You have received orders to run against current traffic; no human is infallible, and these orders are transmitted between one point and another, and by the time these orders are transmtited, this man may make a mistake and let the man along the line with the current of traffic who doesn't require an order, and therefore it requires a man to protect that movement.

THE COURT: All right. I think that is all.

By MR. PRICE:

Q. Let me ask you,—did you ever work for the P. R. R.?

A. No, sir.

THE COURT: I don't know whether he said that with regret or not, Mr. Price. (Laughter.)

[133] MR. RICHTER: Mr. Schwartz.

ADOLPH F. SCHWARTZ having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

THE COURT: All right.

By MR. RICHTER:

Q. By whom are you employed?

A. As actuary by the Penn Mutual Life Insurance.

Q. You are a life insurance actuary?

A. That is correct.

Q. Do you have with you the American and the English Tables of expectancy of life?

A. Yes.

Q. Will you go on, first, and tell us how these tables are computed?

A. They are computed by taking the death claims——

THE COURT: Members of the jury. I want you to listen to this, both sides, because later on it will be discussed. These tables which will be given you show the natural expectancy of life of a person in good health at a certain age, whatever that might be. The lawyers on both sides will discuss it, and the Court will explain the legal aspect of it later.

[134] Do you mind if I tell the jury this, Mr. Richter?

MR. RICHTER: Not at all.

THE COURT: So that you will not get something fixed in your minds, these figures showing the expectancy of life are not to be taken by you as being fixed and absolutely certain, but their full import will be ex-

plained later, and you are not to be bound by any particular figure; when the expert tells us that at a certain period of life, at 34 or at 36, that we will live so many years, that there is any certainty about it. Keep your minds open on that, and later on we will discuss it fully.

By Mr. Richter:

Q. Mr. Schwartz, tell us how they arrive at these figures.

A. The tables are derived from statistics of death claims among certain groups of individuals.

Q. How are the English Tables computed?

A. They were obtained from the death claims among the population of a town in England, Carlisle in this particular case.

Q. And how did they come to the conclusion that certain persons at certain ages would live to certain ages?

A. They took the number of persons living at various ages and determined how many of them will die during the next year.

[135] The Court: Will you tell the jury about what year they were taken? They were taken before the advent of the atom bomb and the automobile, and many other gadgets.

The Witness: They were taken about the end of the 18th Century; 1780, I believe.

By Mr. Richter:

Q. And how about the American Table of life insurance?

A. They were derived from statistics on insured lives in this country; that is, people insured by the life insurance companies. That was about—it was published about 1868.

Q. And they were on insurable lives, people with fairly good health?

A. That is right.

Q. They took the averages of the different groups and the different ages and determined their expectancy of life?

A. The same as the other.

Q. Are these tables still being used by life insurance companies?

A. They are.

Q. Mr. Callen testified that he is presently 35, and will be 36 in the next month. At figure 36, will you tell us what his expectancy of life is under the English Tables?

A. At age 36, by the Carlisle Table, the expectancy is thirty years.

[136] Q. And what are the figures under the American Tables of expectancy?

A. 31 years.

THE COURT: What was that last question? I was thinking about the form of the question.

MR. RICHTER: Under the English Tables the expectancy of life is 30 years, and under the American Tables it is 31 years.

THE COURT: That is because they live in America. Thirty-one years here—all right.

By MR. RICHTER:

Q. As a matter of fact, Mr. Schwartz, is it a known fact that the expectancy of life has been extended due to the improvements and advances in medical knowledge?

A. Yes, that is, all except the older ages. As we get older we don't seem to be doing so well. But, I can give you figures for some of the latest United States Tables.

Q. Will you show us what the expectancy in the more recent tables is for a man 36 years of age?

THE COURT: A married man?

MR. RICHTER: A married man, yes, sir.

THE WITNESS: It is the same; it only seems longer for a married man.

But, at age 36, it would now be 33 years.

[137] MR. RICHTER: That is all, cross-examine.

THE COURT: Mr. Price?

CROSS-EXAMINATION.

By MR. PRICE:

Q. These figures you have given all relate to what are called in your profession as selected risks?

A. Only the second one; only the table from the American experience. The last one I gave comes from the United States life table, and they deal with the entire population of the United States.

Q. But the American Table that you spoke about are for selected risks or persons that had passed the life insurance examination?

A. That is correct.

THE COURT: That is the 33 year table, Mr. Price?

MR. PRICE: No, 31 years.

By THE COURT:

Q. What is the 33 year table?

A. That is the population; that is the most recent population.

Q. Based on the population of census?

A. That is during the years 1939-1941. That is the latest we have.

[138] THE COURT: I had not heard of that.

THE WITNESS: It was issued only a year ago.

By MR. PRICE:

Q. But the insurance companies have not adopted that schedule as their basis of insuring?

A. No; we like to be on the safe side, and have plenty margin.

Q. You still act conservatively?

A. We still act conservatively.

MR. PRICE: That is all.

THE COURT: I am just studying that. 36 and 33. That compares favorably with the Scripture Three Score and Ten.

By THE COURT:

Q. Do they give the number of people who live to be 70 years of age?

A. You mean those who will live to be 70?

Q. Yes.

A. I haven't the figures with me, but it can be obtained.

Q. You said with reference to our old age that we were not doing quite so well.

A. The improvement has been made in the younger ages, especially the young children. But from 45 to 50 and over we are just as bad as a hundred years ago.

[139] Q. In other words, vaccination, the pasteurization of milk, diphtheria antitoxin, have all gone to help save a lot of the children who formerly would have been lost, and that has carried them up the middle age and raised the general standard?

A. That is right.

Q. But our old people—well——

A. The span of life is about the same.

THE COURT: All right, thank you very much.

MR. RICHTER: For the purposes of the record, it is agreed that this accident occurred in interstate commerce; therefore, this particular act applies.

THE COURT: If you will tell the jury——

MR. RICHTER: It is agreed that this man was engaged in interstate commerce, and therefore the Federal Liability Act is the Act which controls.

THE COURT: In other words, if there were not the interstate commerce carrier feature in the case we would not have jurisdiction, and it would have to be tried in some state court. That is what that means.

What is the next step?

MR. RICHTER: May I have the earnings and employment records of the plaintiff, Mr. Price?

(Counsel produces same.)

[140] MR. PRICE: And we have the timekeeper here.

MR. RICHTER: All right.

ALBERT L. MARTIN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. RICHTER:

Q. By whom are you employed?

A. Pennsylvania Railroad.

Q. In what capacity?

A. As clerk in the timekeeper's department.

Q. Do you have with you the records of the plaintiff in this case, Mr. Rudy Callen?

A. Yes, sir.

Q. Will you please tell us what his earnings were for the year before or the year prior to this accident?

THE COURT: What was that question?

MR. RICHTER: The earnings for the year, or the period of one year, prior to the accident.

THE COURT: All right.

THE WITNESS: Prior to the accident, well, for the year prior to the accident he earned $2,552.35.

By THE COURT:

Q. That was the year 1944?

[141] A. Yes, sir, 1944.

Q. $2,552.35?

A. That is right.

By MR. RICHTER:

Q. That is for the year 1944, up until the date of the accident?

A. That is right.

Q. Now, can you tell us what the earnings were during the last two weeks in November, 1944?

A. The last two weeks, November, 1944, $114.73.

Q. Can you tell me when it was he hired on with the company?

A. He hired on with the company, April 27, 1942.

MR. RICHTER: That is all.

THE COURT: Wait a minute—one minute.

By THE COURT:

Q. $45.00 plus a week—is that what it would make his average earnings in 1944?

A. From the time he commenced work——

Q. No, for the year 1944.

A. I don't have it by weeks.

Q. Do you have the 52 pays?

A. I have it twice a month, 1st to 15th; and 16th to end.

Q. Did he work the whole year?

A. Yes, sir.

[142] Q. He was employed the whole year?

A. Yes, sir.

Q. And there are 52 weeks in a year—$2,552——

MR. RICHTER: There are two weeks missing out of the year, after the accident. The accident happened on December 14, and he lost a few days in between.

THE COURT: 50 weeks?

MR. RICHTER: $50 or $52 a week, we figure.

THE COURT: Not quite $50.00 a week.

THE WITNESS: That is for the entire year. We don't have it by the week.

CROSS-EXAMINATION.

By MR. PRICE:

Q. By the entire year, you mean for 52 weeks?

A. That is right. Our pay sheets are from the 1st to 15th, that is what we call the first period; and from the 16th to the end of the month. We don't divide it by weeks. There are just two totals for each month, the 1st to the 15th; and the second, from the 15th or the 16th to the end, regardless of whether he works every day or not.

Q. This period you said was a year, when did that start?

A. That started the first day, that would be in January, 1944, because he made no time after the 10th of December in 1943. So, we didn't have to go back to get any earnings to [143] start out in 1944. No earnings carried over into 1944 because he had no earnings after the 10th of December in 1943.

THE COURT: So that it is about $49.00 a week?

MR. RICHTER: Somewhere in that neighborhood, Your Honor.

By MR. PRICE:

Q. When you are speaking about a year, does that start with the second half of December, 1943?

A. No, it starts with the first of January. He had no money there. You understand what I mean now? For instance, if you want his earnings in 1944, on December 20, then you would have to the end of the month—on the 20th, say, from the 21st of December, 1943, to the end of the month, and add that to 1944 to give the complete year.

Q. Did you do that?

A. He had no earnings after December 10, 1943, so that there is nothing to be added.

Q. You mean he didn't work after December 10, 1943?

A. That is right. That is, in that year.

Q. He missed 20 days, or three weeks in December, 1943?

A. That is right.

MR. RICHTER: 1944 or 1943?

THE WITNESS: 1943.

[144] By MR. PRICE:

Q. The figures you gave represent his actual earnings covering a twelve month period?

A. That is right.

Q. Now, you were asked what his earnings were the last half of November, 1944, and I think you said $114——

A. $114.73.

Q. What were his earnings the last half of October, 1944?

A. October, $65.66.

Q. And the last half of September?

A. The last half of September, $110.44.

Q. And the first half of September?

A. $96.84.

Q. Then what were the earnings for the first half of July and August?

A. The first half of July is $71.17; and the first half of August is $71.60.

Q. You got his earnings for 1943?

A. Yes.

Q. What do they amount to for the preceding year?

A. 1943 is $2,116.30.

Q. How much?

A. $2,116.30.

Q. Is that for the twelve months of 1943?

[145] A. That is right; that is the calendar year, twelve months of the year.

Q. Now, are these figures that you gave, that is, the $2,552.00 and the $2,166.00, is that the gross income or the net income after deductions?

A. That is gross. The $2,552.00 is gross.

Q. What would the deductions amount to,—what would be deducted before he was paid that money?

A. Well, it varies with his federal income tax and his retirement tax he would have, I would say,—I can get it exact——

THE COURT: We will take a recess for five minutes, please.

(Informal recess.)

THE COURT: All right.

THE WITNESS: You asked me what his earnings would be after his deductions.

MR. RICHTER: That is objected to. That is not an element here. His earnings is what controls. A man has certain savings that he gets as retirement, and he is entitled to the benefit of all that. Then, he might go on the outside and buy life insurance, and the premiums that he pays would not be deducted. His income tax is paid directly out of his earnings, but he has still earned the money. He [146] should be given credit for the full amount he earns.

THE COURT: Is it your thought, Mr. Price, that this evidence is being offered to help the jury in arriving at the present worth of any award that they might make, if they should make any?

MR. PRICE: I think they are entitled to know the whole story. Of course, what he pays in income tax would be a deduction from any amount he is awarded.

THE COURT: Suppose the jury,—and this is just a hypothesis,—this has no effect on their own judgment, —is it your thought that any award that the jury might make will be subject to income tax?

MR. PRICE: No, sir. Although an employee pays income, he doesn't pay on any award of a jury.

THE COURT: You are directing this to the present——

MR. PRICE: In part to that; but, in addition to that, I am——

THE COURT: I think all that ought to be in the minds of the jury; if we give them the complete facts so far as the rules of evidence will permit, Mr. Richter.

MR. RICHTER: I will abide by your Honor's thoughts.

THE COURT: You can always trust the jury to [147] do the right thing. When twelve men and women get together, if we can't trust them, we might as well shut up shop.

MR. RICHTER: That is all right. I will withdraw the objection.

THE WITNESS: There is just a difference of $204.00. His earnings would be $2,348.35 for the year, after his deductions are taken out.

By MR. PRICE:

Q. Deductions for what?

A. Federal income tax; retirement tax; and what we call the voluntary relief fund.

By THE COURT:

Q. How much is the net?

A. $2,348.35.

RE-DIRECT EXAMINATION.

By MR. RICHTER:

Q. That voluntary relief is a sort of health and accident insurance?

A. Well, no, I don't know; I don't know enough about insurance to answer you on that.

Q. He gets payments while he is disabled from that relief fund?

A. That is right.

Q. And he voluntarily pays into that?

[148] A. That is right.

Q. Not every employee has to pay?

A. They call it voluntary, but I think most of the employees belong.

Q. Most of them belong to it voluntary?

A. Oh, yes.

Q. And for the other year, the preceding year, would the deductions be about the same?

A. Practically the same. I didn't figure them, although.

Q. You mean the deductions would be about the same?

A. About the same, yes, sir.

MR. RICHTER: That is all.

MR. PRICE: That is all.

THE WITNESS: There wouldn't be much difference.

THE COURT: Anything more of Mr. Martin?

MR. RICHTER: That is all I have.

THE COURT: All right.

MR. RICHTER: Thank you.

MR. RICHTER: Now, Mr. Price, will you produce to me the doctor's reports and the reports of the X-rays taken at Toledo?

MR. PRICE: I can't find them, and haven't [149] been able to find them since Mr. Richter asked me to produce them, the original of the reports of the doctor. All I can find is what is marked a copy, and what looks like a copy or purports to be a copy of letters written by a doctor about the X-ray. Now, I assume they are accurate. Somebody must have made a copy of the letter, and I do not object on the ground of accuracy.

THE COURT: What records are they,—your records?

MR. PRICE: They came out of my file. Mr. Richter asked if I could find the report of the doctor who made the X-ray.

THE COURT: And did you find it?

MR. PRICE: All I can find are these two papers which are simply typewritten copies that someone made,—I assume they are typewritten copies of the letters.

THE COURT: How about that?

MR. RICHTER: I haven't seen them.

THE COURT: May I ask whether, from your experience, they are the usual or regular order or the way in which they are issued?

MR. PRICE: No, this is completely unusual,—a unique situation.

THE COURT: These are the only records you [150] have?

MR. PRICE: These are the only records I have.

MR. RICHTER: We are satisfied. May I mark them Plaintiff's exhibit?

THE COURT: All right.

(The copy of the report referred to, dated February 14, 1945, was marked Plaintiff's Exhibit 6 for identification.)

MR. RICHTER: This is the report, if Your Honor please, of Doctors Deming and Thompson, 319 Medical Building, 316 Michigan Street, Toledo (2), Ohio.

Name of Patient Challen, Rudy
Address New Brighton, Penn. R #2.
Part to be Exam. Cervical and lumbar spine
Clinical Diag.
Referred by Mr. Veidt, Claim Agent, Penn. R. R. Co.
No. D7194
X-Ray Findings Date 2/14/45

The bodies of the cervical and lumbar vertebrae are regular in outline and show no evidence of any fracture or dislocation. The angle formed by the last lumbar vertebrae and the top of the sacrum is within normal limits. There is incomplete union of the posterior arches of the first sacral segment due to a congenital anomaly.

M. M. Thompson, Jr. M. D.

[151] MR. RICHTER: Dr. Jepson, will you come up, please.

PAUL N. JEPSON having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

THE COURT: All right, Doctor.

THE WITNESS: Paul N. Jepson, 255 South 17th Street.

By MR. RICHTER:

Q. Dr. Jepson, you are a graduate physician, are you?

A. Yes, sir, University of Pennsylvania, 1920.

Q. Have you specialized in any particular field of medicine?

A. Orthopedic surgery.

Q. Will you please tell us what your general experience and training has been following your graduation in 1920?

MR. PRICE: There is no question about that.

MR. RICHTER: I want the jury to know who Dr. Jepson is.

THE WITNESS: Internship at Presbyterian Hospital.

Seven years as assistant orthopedist, Mayo Clinic.

Connected with the Massachusetts General and [152] the Childrens' Hospital in Boston for a year and a half.

I am chief of the orthopedic service of the Doctors' Hospital, Fitzgerald Mercy, St. Joseph's, and Rush; consultant orthopedic surgeon at various hospitals outside of Philadelphia.

By Mr. Richter:

Q. Did you examine the plaintiff, Rudy Callen, in this case, at my request?

A. July 3, 1945, I think.

At that time he complained of pain in his back said to have been sustained in an accident on December 14, 1945. He said that while trying to avoid being knocked down from a locomotive that he twisted his back. He told me he had seen a chiropractor, a medical doctor, and the company's doctors. That was diagnosed as a sacroiliac strain, and at that time he was wearing a belt.

Physical examination: The back motion had some slight restriction of motion, and the lower extremities were locally limited. His back motion almost approached normal at the time, however. His feet were all right. Straight leg raising test was all right. I advised X-ray of the lumbar spine and pelvis, which was reported negative. I prescribed baking and massage, and advised that he sleep on fracture boards.

[153] The Court: What is that?

The Witness: That is boards placed under the mattress so that there will be no sagging and strain on the back.

I advised the gradual removal of the belt, so that he could gradually resume normal functions.

I again saw him on July 5, at which time he had baking and massaging, and I advised him to discard his belt.

On 10-2-45, his back motion approached normal, and I felt that he was ready for dismissal.

By Mr. Richter:

Q. Did you treat him all during this period?

A. He has been treated all through with baking and massage.

On 4-11-46, his back motion approached normal. He said he did do heavy work but his back was sore. I have that in quote marks.

I again saw him on 5-21, yesterday. At that time he again had muscle spasm. He had restricted motion in his back.

Q. What is muscle spasm?

A. Muscle spasm is where the muscle tightens and shows a little quivering.

Q. What does that indicate?

[154] A. That is an indication of soreness or pain in the low back.

Q. Is that voluntary or involuntary?

A. That is involuntary.

Q. In other words, you can't simulate it?

A. He can't simulate that, no.

My diagnosis was that of low back strain.

My feeling, after seeing him yesterday, and due to the fact that the findings were the same as at first, was that his low back strain was of a chronic nature.

By The Court:

Q. What is meant by a low back strain?

A. A low back strain is right about in the hollow of the back; a low back strain is at the angle where the spine sits into the pelvis, the sacroiliac junction. That includes the two sacroiliac joints, where the two pelvis bones comes together and are fastened together by ligaments,—that is the area that is designated.

The Court: Strain of the lower part of the back?

The Witness: That is right.

By Mr. Richter:

Q. You said that this is a chronic condition?

A. I feel in this case the low back strain will persist [155] for many, many months, sometimes longer. When that persists longer than from three to six months' time, they get into the chronic stage of low back strain.

Ordinarily a low back strain is over his symptoms and without pain and without muscle spasm in three to six months with treatment.

I have no knowledge of any other strain having taken place between my examinations, 4-11, and this, and I am taking it for granted there was no other strain.

Q. And you now find he has a chronic condition?

A. I feel he has a chronic low back strain, with limited function of around fifteen per cent.

Q. That is a permanent condition?

A. It is difficult to say whether or not that is permanent. Even these chronic backs do get better and get over their pain with treatment.

It is not advisable while they have pain—that is, described by the patient—it is not advisable while they have muscle spasm, which is seen and described by the doctor, for them to do heavy type of work, because that will only irritate it.

Q. This man has had this condition since December, 1944, approximately 16 or 17 months; in your experience is it likely that he would get better?

[156] A. This man has youth in his favor; he is 35, and his chance of getting better is much better than for a man 50 or 60. How long this will persist, I am unable to say, but it has persisted now for a year and a half.

Q. He tells us he is still getting treatment of Dr. Sheets in his home town, and he goes over to him once a week, and that the pain is still continuing, and in dampness and humidity it gets real sharp, like a toothache; in view of the fact that he has been under the doctor's care all this time, are you able to conclude whether he is likely to im-

prove any or be able to get the full motion or use of his back?

A. The usual thing is for these patients to improve, but he wouldn't improve so he has full one hundred per cent. motion in his back or one hundred per cent. function, because men with chronic low back strain carry a certain percentage of limited motion, sometimes, throughout their life.

I might say this man has a so-called spina bifida, and such a back starts with a little weakness in the lower area.

Q. Does that make him predisposed to a permanent injury of this kind?

A. He may be predisposed to low back strain.

Q. It takes less for him to get this strain that somebody who has no such anomaly?

[157] A. That is my idea.

Q. What is your bill for these charges, for all that?

A. I have a bill of $120.00.

Q. Is that a fair and reasonable bill for the services which you have rendered?

A. I feel it is.

MR. RICHTER: Cross-examine.

CROSS-EXAMINATION.

By MR. PRICE:

Q. You said there was some X-rays taken at your request?

A. Yes; these X-rays were reported as negative.

Q. Had you been advised about these earlier X-rays taken in Toledo?

A. Not until I heard about them in court this afternoon.

Q. You heard that that report was negative. Does that correspond with the X-ray report that you got?

A. Yes.

Q. What was the anomaly that you speak about?

A. It is technically known as spina bifida, which means there is a failure of closure over the sacro portion of the spinal column; that is, closure of the bone protecting the spinal cord. In that area it protrudes out like a horse's tail, and it is not——

MR. RICHTER: That is something he is born [158] with?

THE WITNESS: Yes, sir.

By MR. PRICE:

Q. That is not due to accident?

A. No.

Q. You saw him on July 3.——

A. July 3, 1945.

Q. Did he give you a history of treatments up to that time?

A. Yes.

Q. What kind of treatment did he describe having had?

A. As I said before, he had seen a chiropractor, and then he had a medical doctor, and then he had the company's doctors. As I understand, when I got this man here in court, he was getting injections. I don't know what those injections were.

Q. And this chiropractor, or whatever the proper term is, is that the kind of treatment that is helpful or useful for low back strain?

A. I don't like it.

Q. You wouldn't prescribe that kind of treatment yourself?

A. No, Mr. Price.

Q. It is definitely the wrong thing to do in that kind of a complaint?

A. Well, I feel it irritates the sore spot.

Q. The kind of treatment that you gave was quite different [159] from manipulation?

A. The treatment he got was baking and massage, with gradual increasing exercises with the idea, first, to eliminate

the inflammation, and after eliminating the inflammation to try to rehabilitate the muscles that were strained and get back the functions of such muscles.

Q. Did he respond readily to that treatment?

A. Yes, he was a good, cooperative patient.

Q. So that he definitely progressed in the right direction under your guidance and treatment?

A. I hope so.

Q. What was the duration of these treatments, how many months or days?

A. I saw him beginning in July, and he was treated on September 2, 1945, last.

Q. How many treatments did he get, approximately?

A. Three times a week.

Q. These were given by you or somebody under your supervision?

A. By my physiotherapist, under my supervision.

Q. And that kind of treatment that you described is the proper treatment that should have followed immediately upon this type of an injury or strain of the back, to obtain the best result?

[160] A. I feel so.

Q. So, if he had been authorized to go to you sooner, you would have been able to do more for him?

A. That is usually the case.

Q. The long delay, therefore, in getting the proper kind of treatment was a factor which increased his symptoms, disabled him, and so on?

A. It could be.

Q. When you discharged him, or when you last stopped giving him treatments in the first of October, 1945, you thought then he was able to go back to work?

A. I felt he could resume light work and get back to work. I don't like the low back cases to get into heavy work at once.

Q. By gradually increasing the type of work he was doing, and exercises, you would expect him to build up his

muscles and ligaments of the back and finally go into regular work?

A. Under ordinary circumstances, yes.

Q. I am sorry I didn't hear very well, I didn't know whether you said "strain" or "sprain"?

A. These two terms are almost synonymous. I did say strain, according to the terminology accepted by the American College of Surgeons.

Q. Strain. I didn't know whether I heard it correctly or [161] not.

A. That is the accepted term.

Q. You don't know, of course, except from what he told you, what caused this low back strain?

A. I do not.

Q. That would come from any number of things, could it not?

A. Yes, including such an accident as he had.

Q. Yes, of course. Anything that might twist his back or put an extra strain on his back, or anything else——

A. Could cause such a condition.

Q. It doesn't have to be violent exercise or a violent injury?

A. No, I have seen these backs strained by a heavy sneeze.

Q. Even a heavy sneeze could produce the low back strain which you described as existing in Mr. Callen?

A. That is right.

Q. So that it is a condition that can be acquired very easily?

A. By various types of strains, yes.

Q. At the present time you notice somewhat more restriction of motion than you did a year or six months ago?

A. Yes, but very much more than on 10-2-45, when I thought he was ready to return to work, because his restriction of motion when I saw him yesterday was about one-third normal, [162] and he had very definite muscle spasm; the erector spinae come up like a whip cord and quivering.

Q. That condition did not exist on 10-2-45?

A. No, that is right.

Q. So that this condition he has now must come from some other strain or sprain, to make his condition worse?

A. Not necessarily; if nothing has transpired between the date of 10-2-45 and this date, 5-21-46, he could have a chronic low back strain both times, or he might be going through his routine daily chores and get such a condition without any special strain or occurrence or event.

Q. Or even sneezing which otherwise he would not be conscious of?

A. That is right.

MR. PRICE: That is all.

THE COURT: Anything else, gentlemen?

MR. RICHTER: That is all.

THE COURT: Tomorrow morning at 10:00 o'clock.

(Whereupon at 4:02 o'clock P. M., an adjournment was taken to Thursday, May 23, 1946, at 10:00 o'clock A. M.)

THIRD DAY.

[163] Philadelphia, Pa., May 23, 1946.

Before Honorable George A. Welsh, *J.*, and a Jury.

Present: B. Nathaniel Richter, Esq., and Joseph S. Lord, 3d., Esq., for the Plaintiff.
Philip Price, Esq., and Scott Seddon, Esq., for the Defendant.

The Court: Both sides ready?

Mr. Richter: Yes, sir.

[164] PLAINTIFF'S EVIDENCE (Continued).

Mr. Richter: Dr. Sheets, please.

R. L. SHEETS, having been duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Richter:

Q. Dr. Sheets, you are a graduate physician?

A. Yes, sir.

Q. What institution and what year?

A. Hahnemann, 1920.

Q. Have you specialized in any particular field of medicine since that time?

A. Surgery.

Q. Where is your office?

A. 1127 8th Avenue, Beaver Falls, Pa.

Q. Have you been practicing medicine from the time of your interneship to the present?

A. Yes, sir.

Q. You are still actively engaged in medical work?

A. Yes, sir.

Q. Did you have, in the course of your practice, as a patient the plaintiff in this case, Mr. Rudy Callen?

A. I did.

[165] Q. Will you tell us when it was after December 14, 1944, that you saw Mr. Callen for the first time?

A. Well, it was towards the latter part of December that he came; that was the first visit.

Q. Will you tell us what your examination revealed, Doctor?

A. Upon examination we found a large amount of spasticity of the muscle.

Q. In what part of the back?

A. The sacroiliac region. We gave him various tests that we use to determine the condition of the sacroiliac subluxation, and found he was suffering from——

THE COURT: Just a minute, Mr. Richter. Will you ask Dr. Sheets to explain to the jury where the sacroiliac region is.

By MR. RICHTER:

Q. Will you do that, Doctor, please.

THE COURT: Just explain what the sacroiliac region is.

THE WITNESS: The sacroiliac region of the back is the lower part between the thorax vertebrae and the tail bone. It comprises of about eight vertebrae, and is the lower part of the spine between the thorax and tail.

By MR. RICHTER:

Q. And what do you mean by the word subluxation?

[166] A. Well, it is a condition of the ligaments, where the ligaments are torn, while the joint is pulled apart.

Q. Did you treat him at that time?

A. Yes, sir.

Q. What did you do in the way of treatment?

A. Well, we taped him first, using elastic tape for that purpose; we taped him up and gave him an anodine for the

pain,—anodine is a narcotic such as codeine, aspirin, or any of those drugs. We ordered rest and told him not to go back to work for quite some time.

Q. At that time when he came to you did he give you a history of how he had been injured?

A. Yes; he said he was riding on the tank behind the locomotive——

MR. PRICE: I object to any recital——

By MR. RICHTER:

Q. At any rate, he told you he had an accident?

MR. PRICE:—and ask that that portion be stricken out.

THE COURT: I am going to sustain the objection, Mr. Price. The history of a case as given to the Doctor is one of the exceptions to the hearsay rule, and can be given by the Doctor with the understanding that the statement of facts so related is not to be accepted necessarily as [167] a fact as to how it happened, but it constitutes a part of the history of the case.

The Doctor can testify what the patient told him, and then be asked the question whether or not such a state of facts could produce such a condition in the body.

If Mr. Richter can get around the case, in view of the fact that we heard the story from the plaintiff's own lips, I would prefer that; and for that reason I will sustain the objection.

MR. PRICE: And I ask that that portion of his answer be stricken.

THE COURT: Yes, very well.

MR. PRICE: Thank you.

By MR. RICHTER:

Q. You mention the words spasticity of the muscle; tell us what that means.

A. It is a sort of doubling of the muscle; when you make pressure the muscle goes into a spasm.

Q. Is that voluntary?

A. That is involuntary.

THE COURT: There is another expression that is used. While I think most of us know what involuntary means in the ordinary use of the term, I am going to ask the Doctor if he will tell us what that word means as applied [168] to the human body in an examination of that kind.

By THE COURT:

Q. What do you mean by an involuntary muscle?

A. An involuntary muscle is not under the control of the will; voluntary muscles are.

By MR. RICHTER:

Q. So that when you say this spasm was involuntary, it was something that he had no control of?

A. That is right.

Q. Did you see him right after that time he first came to you?

A. No, he didn't come back right away.

Q. When did he return to you for further treatment?

A. About the middle of March.

Q. Did you learn whether he had received treatments in the meantime?

A. Yes, he said he had.

Q. From a chiropractor?

A. From a chiropractor.

Q. Did you continue to treat him for some time?

A. Yes, he came then about twice a week up to the middle of June or July,—or the last of June.

Q. What type of treatment did you administer during that period?

[169] A. We had him get a belt, a sacroiliac belt, and we used heat treatment and applied tape; but mostly he wore the belt.

Q. Now, Doctor, you say you saw him twice a week until sometime the latter part of June?

A. Yes, sir.

Q. Did you learn he came to Philadelphia and received a course of treatments——

A. I did.

Q. Under Dr. Jepson?

A. Yes, sir.

Q. And did you see him again after that?

A. He came back in October, the first of October.

Q. Did he seem somewhat improved?

A. I think he was slightly improved, but still very much incapacitated.

Q. At any rate, did you learn whether he returned to work?

A. No, no; he had not worked up to that time.

Q. Did he, thereafter, go back to work?

A. No, I don't think so.

Q. And did you treat him for the period of time from late in October until the present time?

A. That is right.

Q. How often have you seen him?

A. He comes in about once a week.

[170] THE COURT: For what? Ask the Doctor for what.

By MR. RICHTER:

Q. What does he come for?

A. He complains a lot of pain; we had to tape him up and use heat on him, and give him something for pain.

Q. Does his condition seem to get better or worse, or vary; or what?

A. Well, at times he seems somewhat improved, but in general the condition was very bad.

Q. Now, Doctor, Mr. Callen told us around the 19th of October he undertook a job at a plant in Ambridge, where he hooks a chain around some pipe,—I suppose you are familiar with what that is,—at the National Electric Products Company. Do you know where that is?

A. Yes, I know.

Q. That is not far from your town?

A. That is right.

Q Would you say that type of work is likely to aggravate the condition or make it better by doing that?

A. Mr. Richter, I am not familiar with the work that he is doing. I don't know how strenuous it is.

Q. When did you last see this man for treatment?

A. About a week ago.

[171] Q. What can you say about the presence or absence of spasticity of the muscles?

A. He is about fifteen to twenty per cent below par, I would say.

Q. If this man had this condition since December, 1944, until this date, would you say that his condition is acute or chronic?

A. Well, he has developed a somewhat low back strain known as sacroiliac subluxation, and a man in that condition is certainly not able to do heavy work,—the type that he is accustomed to.

Q. Could he do braking?

A. No, absolutely not.

Q. Doctor, is this condition, in your opinion, temporary or a permanent condition,—or is there any likelihood of him getting better?

A. I would say he is permanently disabled.

Q. You think he is permanently disabled. Do you think he will have periods of time when he will feel better than now?

A. It doesn't look like it. The man lost thirty pounds in weight; he is psychogenous, and he is run down and complains of feeling tired.——

Q. How long have you known Mr. Callen?

A. About ten years.

[172] Q. Was he and his family patients of yours?

A. Yes, sir.

Q. He lives in the same town in which you live?

A. Well, he lives in Beaver; that is about four miles from Beaver Falls.

Q. Taking his condition as you knew it to be before the date of the accident and what it is now, would you say you noticed any change in the man's general appearance?

A. Oh, yes; he used to be robust in appearance, much heavier looking than he is now.

Q. What do you attribute the change in his appearance to?

A. I think it is the result of the injury.

Q. This back injury?

A. Yes, sir.

Q. Would you say it involved his nerves in any way?

A. Yes, he is highly nervous, too; restless.

Q. Did you observe any psychogenic?

A. I think there is some.

THE COURT: What does that mean? Explain that to the jury.

By MR. RICHTER:

Q. What is a psychogenic change, Doctor?

THE COURT: What does that mean to us? We have to have the A. B. C.'s. Tell us what that is.

[173] THE WITNESS: I don't want to embarrass anyone——

THE COURT: I am in deep water now.

THE WITNESS: It is a mental change, a psychic change.

THE COURT: How do you spell it, Doctor?

THE WITNESS: P-s-y-c-h-o-g-e-n-i-c.

THE COURT: Psychogenic.

By MR. RICHTER:

Q. Doctor, in what respect did you observe this mental reaction or change?

A. Well, in the man's restlessness. He would come into the office, and he wouldn't wait; he is very restless and impatient, and he didn't used to be like that.

Q. Do you know if he worries? Is he worrisome in any way?

A. He looks worried. I think he has lost interest in life, Mr. Richter, because he feels that this condition is permanently disabling. That is what I mean by that.

Q. Do you think it has affected his recovery any?

A. Oh, yes. That holds a patient back. The mental attitude means a lot toward recovery.

Q. What was your bill for your services rendered during this whole period of time?

A. I don't have that, Mr. Richter.

[174] Q. Did he pay you each time?

A. He paid me each trip.

Q. How much?

A. Two dollars a call is what we get there.

By The Court:

Q. How much a call?

A. Two dollars a call.

Q. Doctor, would this condition that you found existing in the back, in the sacroiliac region, the bones there, affect the cartilage and muscles,—would that show up under an X-ray?

A. No, sir, it does not.

Q. That is what I want the jury to get. Will you explain that to the jury?

A. It is largely a ligamentous affair,—the ligaments are damaged, and it doesn't show in the X-ray.

X-ray is used more in rheumatic arthritis, anomaly, and congenital conditions.

By Mr. Richter:

Q. And how about fractures?

A. Fractures, also.

Q. In this case, it has been developed that the man had X-rays taken and he has a congenital anomaly in which he has a spinal——

[175] A. Spina bifida.

Q. That is congenital?

A. Yes, sir.

Q. Does that affect the man's capacity to work?

A. No, I don't think so.

Q. Or give him a back injury of any kind?

A. No.

MR. RICHTER: Cross-examine.

CROSS-EXAMINATION.

By MR. PRICE:

Q. Did you bring your records with you?

A. I have no written records on the case,—too busy to keep them right now.

Q. Back in 1944 you didn't keep any records at home?

A. Not since the war, I got too much to do.

Q. You testified entirely from recollection?

A. That is right.

Q. No written memoranda or notes of any kind?

A. We are too busy,—doctors are too busy now to keep records.

Q. Do you remember the details of all your patients?

A. I think I have a pretty good memory.

Q. So that you can remember back in 1943 and 1944?

A. Yes, I think I could.

[176] Q. You know what date he came to see you first?

A. No, I can't tell you exactly,—it was the latter part of December.

Q. And you didn't see him again until March?

A. That is right.

Q. Did you send in to anybody else?

A. No, I did not.

Q. When did you first learn he had an X-ray taken?

A. Well, I saw him one visit in December, and when he came back in March he told me he had one taken.

Q. Did he tell you what the X-ray showed?

A. Yes, he showed this congenital anomaly, the spina bifida.

Q. Did he use those words?

A. He didn't use those terms, but I knew what he meant.

A. As soon as he told you it was a congenital anomaly, you knew it was spina bifida?

A. No,—I had access to the plates; I had them with me.

Q. When did you get access to the plates?

A. Well, it was sometime between March and June; I don't recall those dates.

Q. In what year?

A. 1945.

Q. Where did you see the plates?

[177] A. I got them from the doctor who took them.

Q. Which doctor?

A. Dr. Beach, William F. Beach.

Q. And where does he live?

A. Beaver Falls.

Q. Where did he take them?

A. Well, I can't tell you the exact date.

Q. Where, I said.

A. At his office.

Q. Where?

A. Beaver Falls.

Q. In Beaver Falls, oh.

By THE COURT:

Q. How did you come to go to Dr. Beach if you got the information from him?

A. Well, he told me in his own words, and I figured it out that is about what he had; then, I went down to see Dr. Beach and looked at the plates with Dr. Beach.

By MR. PRICE:

Q. Dr. Beach, of Beaver Falls?

A. Yes, sir.

Q. Do you know when he took those X-rays?

A. When?

Q. Yes.

[178] A. I can't tell the exact date, no; sometime between the time I saw him first and when he came back to me.

Q. Do you know how many plates there were?

A. Three.

Q. Three plates?

A. Yes, sir.

THE COURT: Just a minute. You say it was sometime between the time you saw him first and when he came back to you?

THE WITNESS: Yes, sir.

THE COURT: When he came to you first had he had the X-rays taken?

THE WITNESS: Oh, no, not the first trip, no.

THE COURT: All right. Go ahead, Mr. Price.

By MR. PRICE:

Q. Do you know who sent him to Dr. Beach?

A. No, I do not.

Q. You didn't find that out from Dr. Beach, how he got there?

A. Well, he disappeared,—he left my care and went elsewhere,—and I didn't ask him.

Q. When he came back, did you ask him where he had been?

A. He named some chiropractor, but I don't know anything about those fellows.

[179] Did you know he had been treated by a chiropractor?

A. Yes, he told me that.

Q. Did he tell you which one?

A. He named him, but I didn't pay much attention to that.

Q. Why? Don't you put any stock in the kind of treatment that a chiropractor gives him?

A. That's right,—we don't usually pay much attention to them.

THE COURT: I think we get what the doctor means.

By Mr. Price:

Q. The chiropractor didn't do him much good?

A. That is right.

Q. Do you know how many times he was treated by the chiropractor?

A. Well, I think,—yes, as I recall, it was somewhere in the neighborhood of 15 or 20.

Q. Do you know what he was doing to him?

A. No, I don't know their bunk at all.

Q. Did you ask Mr. Callen what the chiropractor had done to him?

A. I didn't in detail; he said he had been taking treatment, whatever that means.

Q. But you didn't know what kind of treatments they were?

[180] A. No.

Q. You didn't take the trouble to find out whether the treatments were doing him harm or not?

A. Yes——

Q. How did you find out what the treatments were?

A. Well, after practicing medicine for 25 years you can sort of size the man up.

Q. Would you do that without getting the kind of history from him?

A. What kind of history?

Q. History showing the kind of treatment he got, and what the chiropractor did do for him?

A. I did not go into detail just how the chiropractor treated him. I don't know their methods.

Q. Do you know whether he had any other X-rays taken?

A. No, I do not.

Q. You don't know that?

A. You mean another set?

Q. Yes.

A. No.

Q. You never heard about any others?

A. I don't know anything about those.

Q. Did you tell him he was permanently disabled?

A. Yes, sir, I did.

[181] Q. Did he tell you that Dr. Jepson told him that he wasn't permanently disabled and was going to cure him?

MR. RICHTER: He didn't say he was going to cure him. He said he was going to do his best. That is all he said.

THE WITNESS: He said he had been taking treatments in Philadelphia, baking treatments, from Dr. Jepson.

By MR. PRICE:

Q. Did you ask him what treatments Dr. Jepson gave him?

A. I didn't get that.

Q. Did you ask him what treatments Dr. Jepson gave him?

A. Yes, it consisted of baking.

Q. Anything else?

A. That is all I know about it.

Q. That is all you know about it. You didn't get any details of that treatment either, Doctor.

A. Well, no. You don't go into those things. I don't care what the other fellow does. It is what we do ourselves.

Q. I see. You wouldn't care even if the other fellow was making him better while you were not making much progress?

A. Well, I don't know how to answer that.

Q. Did he tell you he was getting much better when he was down here with Dr. Jepson?

[182] A. No, he didn't.

Q. Did you ask him?

A. I said, "How are you"? and, "What progress are you making?"—yes, of course, we always ask the patient that; that is routine.

Q. But, it is just casual like that, without detail?

A. I went over him afterward, but there was nothing that you could see what the other fellow had done; it doesn't stand out.

Q. You never knew he had gone back to work?

A. No, I didn't know that until just recently.

Q. He told you that?

A. He said he was working down at this National Electric plant in Ambridge.

Q. When did he tell you that?

A. Some weeks back; he had been working some time before I knew it.

Q. Just a moment ago in answer to a question by Mr. Richter you said you didn't think he had gone back to work, and then Mr. Richter told you he had gone back to work and asked if you knew anything about it and you said "no?"

A. I didn't at first. It was sometime after he had gone back before he told me.

Q. I see. So that, although you were treating him or [183] seeing him at least once or twice a week, you didn't even know whether he was working or not?

A. Well, you can't ask the patient all those things every time he comes. He had not been working in days back, and I took it for granted he was still off from work.

Q. Was his condition any different that you noticed when he was working or when he wasn't?

A. No, I don't think it was.

Q. So, as far as his condition was concerned, you couldn't tell any difference during the time he was working and the time he wasn't working?

A. That is right.

MR. PRICE: That is all, thank you.

MR. RICHTER: That is all, Doctor, thank you.

THE COURT: That is all, Doctor, thank you.

MR. RICHTER: Mr. Callen, come back just a moment, please.

RUDY E. CALLEN, recalled.

DIRECT EXAMINATION (Continued).

By MR. RICHTER:

Q. I just want to ask you one question, if I may, Mr. Callen, or two, perhaps.

[184] Dr. Sheets has just told us that you lost some weight. Approximately how much weight have you lost since the date of the accident?

A. Well, I weighed 209 before the accident.

Q. And how much do you weigh now?

A. I didn't weigh myself this last week; but I weigh approximately 186 or 187 now.

By THE COURT:

Q. With clothes on?

A. That is right,—both ways.

Q. When you weighed 209, were you stripped or with clothes?

A. Clothes both times.

Q. Winter clothes?

A. No, summer clothes.

Q. And how tall are you?

A. About five, ten.

By MR. RICHTER:

Q. There was some reference as to whether or not all that was said in the statement taken by the trainmaster was accurate, and you said that it was. I just want to ask you about a couple of the questions.

The first question I want to ask, "Were there any X-ray pictures taken of your back?" and you said, "Yes; Mr. Veidt had those taken care of."

[185] "Were there any broken bones?"

And you said:

"I don't know; I haven't received the report as yet."

Had you received the report then?

A. I had not received any written report; no, sir.

Q. Had you received any oral report?

A. Only what I gathered from Mr. Veidt.

Q. After you got dressed at the X-ray doctor's, about how long did you stay there while waiting for Mr. Veidt?

A. Oh, it must have been around a half hour.

MR. RICHTER: That is all.

MR. PRICE: No questions.

MR. RICHTER: Just one more thing——

By MR. RICHTER:

Q. The question was asked whether you ever told anybody that your car was snowed in the garage, and that you shoveled snow. Have you a car in your garage at all?

A. No, sir.

By THE COURT:

Q. Or were you shoveling snow?

A. No, sir.

MR. RICHTER: I wish to offer in evidence the [186] card from Dr. Saul, Plaintiff's Exhibit 4; the check of the Pennsylvania Railroad Company marked Plaintiff's Exhibit 3; the release marked Plaintiff's Exhibit 2; and the statement taken from the plaintiff by the claim agent marked Plaintiff's Exhibit 1.

MR. PRICE: This is objected to.

MR. RICHTER: I do it on the theory that——

THE COURT: Let me look at it first.

MR. RICHTER: Yes, sir. (Produeing same)

THE COURT: You never read from this?

MR. RICHTER: I read from it.

THE COURT: You only read part of it.

MR. RICHTER: That is right, and Mr. Price read from another part.

THE COURT: Something that Mr. Price brought out, but the whole thing wasn't read?

MR. RICHTER: That is right.

THE COURT: I will read the whole thing now——
Now, I will ask you what your theory is.

MR. RICHTER: My theory is this, Your Honor: Obviously, we can't offer a self-serving declaration because the witness himself is here, but where there is a suggestion of recent fabrication we have the right to show that shortly after the occurrence in question the witness involved made [187] statements that were like what he now testifies on the stand. I think that comes clearly within the rules of evidence.

THE COURT: It is correct that Mr. Price asked certain questions indicative of the purpose you just stated. Then you attempted to correct them by referring to the original paper, and you read portions that you thought were applicable to the points raised by Mr. Price——

MR. RICHTER: That is right.

THE COURT: Do you think that would make the whole paper relevant? It might relate to other subjects, too.

MR. RICHTER: I will withdraw it if there is any question about it.

THE COURT: Yes, I think that would be better.

MR. RICHTER: I will withdraw it, Your Honor.

THE COURT: I sustain the objection—oh, you have withdrawn it—all right.

(Thereupon, Plaintiff's Exhibit No. 1, heretofore marked for identification, was withdrawn.)

(Plaintiff's Exhibits 2, 3, and 4 are filed with these proceedings.)

MR. RICHTER: At this point, the plaintiff rests, Your Honor.

THE COURT: The plaintiff rests.

[188] MR. PRICE: Shall we go on?

THE COURT: Yes, go ahead.

(Opening statement to the jury on behalf of the defendant by Mr. Price.)

THE COURT: Do you mind, Mr. Price, if I talk to Mr. Richter about some other case that is coming up? I see some of his witnesses are waiting here.

MR. PRICE: Not at all, Your Honor; you can talk to him about anything, or anything about this case,—that is perfectly all right with me.

(Conference at side bar with Mr. Richter.)

THE COURT: Are you ready now, Mr. Price?

MR. PRICE: Shall I go ahead, Your Honor?

DEFENDANT'S EVIDENCE.

MR. PRICE: Mr. Crum, will you come up, please.

CHARLES E. CRUM having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. PRICE:

Q. Mr. Crum, you are freight conductor for the Railroad Company, and have been for how many years?

[189] A. 46.

Q. I can't hear you.

A. I have been working for the railroad for 46 years.

By THE COURT:

Q. 46 years with the railroad?

A. Yes, sir.

By Mr. Price:

Q. And how long as a conductor?

A. About 40.

Q. Back in December of 1943 or 1944,—December, 1944, —were you conductor for the Railroad Company?

A. Yes, sir.

Q. What run did you have in the early part of December, 1944?

A. ED-4 and ED-3.

Q. What is ED-3 and ED-4?

A. It is similar.

Q. Where does the train run from and to?

A. ED-3 runs from Conway to Toledo.

Q. Conway, Pa., to Toledo, Ohio?

A. Yes, sir.

Q. And ED-4?

A. Toledo to Conway.

Q. That is the return?

[190] A. Yes, sir.

Q. How long did the round trip take?

A. It differs; it differs right along, sometimes ten hours, sometimes twelve, and sometimes sixteen in one way.

Q. Did you say one way?

A. One way.

Q. Do you come back the same day as you went out?

A. No, sir.

Q. Did you come back the next day or two days after, or what was it?

A. Sometimes we came back the next evening, and sometimes they would set us back until the next morning. We always had one day off.

Q. Do you remember the trip you made on December 10, 1944?

A. Yes, sir.

Q. What was there unusual about that?

A. Well, we were stalled at Tiro Hill.

Q. Was that unusual?

A. It was unusual.

Q. What did you do, and what happened as a result of stalling on the hill?

A. Well, I was back at the caboose, and I walked over about one-third of the train, and then I met the brakeman coming back and I asked what he was going to do, and he said the [191] dispatcher said to double the hill.

Q. What do you mean by double the hill?

A. To let a portion of the train stand and take the other portion over the hill.

Q. Take it in two sections?

A. Yes, sir.

Q. Did you do that?

A. Yes, sir.

Q. How far did you have to run from where you took the train to where you left the first section to come back to the second?

A. Five miles.

Q. You did that?

A. Yes, sir.

Q. On the way back, did you come back with the engine alone?

A. Yes, sir.

Q. No cars on it?

A. No cars.

Q. Who cut the train when you first separated it?

A. Well, you mean the air hose and so forth?

Q. Yes, who actually uncoupled the cars?

A. One of the men.

Q. One of the men?

A. I think I did that from the left-hand side.

[192] Q. Where was the end car standing that you left on the track?

A. It blocked a little crossing there.

Q. What kind of crossing was that?

A. Just a country crossing.

Q. No main highway?

A. Oh, no, no.

Q. No traffic moving on that very much?

A. No.

Q. When you came back with your light engine, that is, the engine by itself, where were you riding?

A. In the cab of the engine.

Q. Who else was there?

A. The engineer I had, and the fireman part of the time.

Q. And who else?

A. The pilot engineer.

Q. What is a pilot engineer?

A. He is the man that goes along where the regular engineer isn't qualified over that territory.

Q. Will you explain what you mean by qualified? Qualified to run an engine or qualified to run an engine in that location?

A. The regular engineer isn't qualified to run the engine in that location.

[193] Q. But he is a qualified engineer?

A. Oh, yes, in his own division.

Q. When you have a pilot on board who actually runs the engine?

A. The pilot.

Q. Is it an unusual occurrence or a common occurrence for a pilot to run the engine in his own territory?

A. That is his regular job for him to do.

Q. And if you have a pilot on the engine is it proper for the regular engineer to run the engine?

A. No.

Q. Who is the only person who is authorized to run the engine when you have a pilot on board?

A. The pilot.

Q. And it was the pilot who was running it in this case?

A. Yes, sir.

Q. Was Callen with you as a member of your crew?

A. Yes.

Q. Where was he riding?

A. He rode with me on the rear end of the train when we doubled the hill——

Q. On the way back, with the light engine, where was he?

A. He was up in the flagman's cabin, or dog house, whatever you want to call it,—that is the nickname, dog house.

[194] Q. You had one other member of your crew who was left back with the other cars?

A. The flagman.

Q. And that accounts for your entire crew?

A. Yes, sir.

Q. Who is your regular engineer?

THE COURT: What is that?

By MR. PRICE:

Q. Who is your regular engineer?

A. On this trip?

Q. On ED-3.

A. Hirschmann.

Q. Was there a Mr. Brock who worked with you as engineman?

A. Yes, sir.

Q. When did he work with you?

A. He worked with me,—he was off three trips there,—may I look at my book and find out?

Q. He was off for three trips?

A. Yes, sir.

Q. Otherwise he was your regular——

A. He was the regular engineer on that run.

Q. Which three trips did he go off for?

A. Sir?

Q. Which three trips did he miss?

[195] A. Wait a minute—the 8th and 10th.

Q. I couldn't hear that.

A. The 8th and 10th of December.

Q. That is 1944?

A. Yes, sir.

By The Court:

Q. The 8th and 10th of December?

A. Yes, sir,—1944.

And the 12th and 14th; and the 16th and 18th.

Q. The 16th and 18th Mr. Brock was——

A. Mr. Brock was off.

Q. And when did he come back?

A. On the 20th.

Q. He was back on his regular run on the 20th?

A. Yes, sir.

Q. On these runs that you mentioned, that is, the 8th and 10th, and I think the 12th and——

A. The 12th and 14th.

Q. Does that mean a round trip?

A. They are the two days we work.

Q. And these two days mean one round trip?

A. Yes, sir.

Q. Now, who did you have in your crew on the 10th; who was working with you on that train?

[196] A. J. A. Almond and R. E. Callen, on the 8th and 10th.

Q. And the engine crew, have you got those noted?

A. Well, Hirschmann was the engineer——

Q. Yes.

A. And pilot, Neal.

Q. Neal was the pilot and ran the engine?

A. Yes, sir.

Q. And the fireman?

A. Patterson.

Q. That is the entire crew?

A. Yes, sir.

Q. What is this book you are looking at?

A. That is the time book that I keep their time in.

Q. You mean that is the detailed memorandum that you make on these runs?

A. Yes, sir.

Q. And when was the next trip after the 10th?

A. Left Conway on the 12th.

Q. Left where?

A. Left Conway, Pa., on the 12th. Left Toledo on the 14th.

Q. On that trip who was your crew?

A. J. Almond and L. Porter, was my flagman and brakeman.

Q. Who was the engineman?

A. P. W. Van Kirk.

[197] Q. Have a pilot on that trip?

A. Not going up, but we had coming back. I can tell you who that pilot was.

Q. Did you double the hill on that trip?

A. No.

Q. Was Callen with you then?

A. No, sir.

Q. Was he there either on the 12th or 14th?

A. Not there on the 14th—the 12th or 14th, neither one.

Q. When did he next work with you?

A. The 16th and 18th.

Q. Who was in the crew then?

A. J. Almond and R. Callen; G. W. Piersol was engineer.

Q. On that trip was any comment or complaint made by Callen to you about any accident he had?

A. No, sir.

Q. When was the next trip you had with him?

A. On the 20th, we went up.

Q. The 20th of December?

A. The 20th of December.

Q. Callen worked with you then?

A. He worked up to Toledo.

Q. When he got to Toledo what did he tell you?

A. He told me he was going back home to Rochester on 106.

[198] Q. Why?

A. He said he got some ligament torn in his back.

Q. And what else did he say?

A. I said, "How did you do it?" He said, "Throwing the derail at Tiro the day we doubled the hill."

Q. Did he tell you at that time anything about an engine coming back too fast, and having had to jump off the train in order to save himself from being thrown?

A. No, sir.

Q. When he came back to work on the 16th did you ask him why he skipped the 12th and 14th?

A. Yes, sir.

Q. And what did he say?

A. He shoveled snow for two days to get his car out of the garage.

Q. Did he say anything about being injured or hurting his back on the 12th or the 10th?

A. No.

By THE COURT:

Q. Did you write that down at the time?

A. No, sir.

Q. You did not?

A. No, I did not.

[199] By MR. PRICE:

Q. Then, coming back to the 20th, he said he was throwing the derail and hurt his back?

A. Throwing the derail when doubling the hill.

Q. What is a derail?

A. That is what we call a toad; the regular name is derail.

Q. What does it do?

A. It is laid up on the track to keep cars from running out. It is used for lots of things, for that matter. We had to throw the derail off the main track—it is on the clearance point on the main track.

Q. That is something you put on the tracks to derail the cars before they could run out on the main track?

A. Yes, sir.

Q. Did he handle the derail that day?

A. Yes.

Q. He did?

A. Yes.

Q. Going back to the 10th, when you rode back on the engine, when you came back light——

A. Yes, sir.

Q. Was there anything unusual about the coupling operation made at that time when you coupled up your standing cars?

A. No, sir.

[200] Q. Could you tell about how fast you were moving when you made the coupling?

A. I would say around two miles an hour when we made the coupling.

Q. Were you looking out your side of the engine as you were backing up?

A. Yes, sir.

Q. Did you see Callen at any time until after the coupling was made?

A. No, sir.

Q. After the coupling was made where was he when you first saw him?

A. In the dog house.

Q. How did you happen to notice he was there?

A. When we went to start we couldn't start. I told him when we made the cut I would turn the air on the cars and for him to wind the slack on three or four cars.

Q. That is, to set the brakes?

A. That is right.

Q. And did he do that?

A. Yes, sir.

By The Court:

Q. Did you know he had jumped off?

A. No, sir.

[201] By Mr. Price:

Q. After you found he still had the brakes on——

A. I said to go back and unwind the slack so we could move on.

Q. At that time did he say anything to you about having hurt his back or having jumped off the engine?

A. No, sir.

Q. On the rest of the trip up to the top of the hill, and from there to Toledo, did he ever say anything about hurting his back?

A. On that trip?

Q. Yes.

A. We were going east.

Q. Whichever way you were going—on the rest of that trip?

A. No, no.

Q. You were coming back from having been at Toledo?

A. Yes, sir.

Q. You had gone out on the 8th and come back on the 10th?

A. That is right.

Q. On the rest of the trip did he report to you having an accident or say anything?

A. No.

Q. What are the railroad rules about reporting an accident?

[202] A. Sir?

Q. What are the railroad rules about reporting accidents of any kind; what is a man supposed to do if he has an accident?

A. He is supposed to report to the conductor.

Q. When?

A. At the time.

Q. Immediately?

A. Immediately, yes, sir.

Q. And the first time that he reported or made any complaint to you about having any accident or hurting his back was on the 20th, ten days later?

A. Yes, sir.

Q. Was there any snow on the 12th of December?

A. In this territory?

Q. Yes, in this territory?

A. There was in this area around Conway.

Q. On December 10, what was that—was that clear?

A. When we went back there wasn't as much snow as when we went; we had about a foot of snow when we left.

Q. Left where?

A. Left Conway; that was on the 12th, understand.

Q. The 12th, yes, was there any on the 10th?

A. Well, I don't know—it was snowing on the 10th—it was snowing.

[203] Q. After that, what I want to know, was there any big snowstorm, after the 10th when you doubled the hill?

A. When we doubled the hill?

Q. After that, was there any snow in this area around Conway?

A. Oh, yes, there was still snow there for quite a little while.

Q. Where was this derail that Callen said that he set when you stopped the train there on Tiro Hill?

A. Where was the derail?

Q. Yes, is that beyond the crossing or——

A. The derail was on the siding at Vernon.

Q. Was that at the top of the hill where you left the other half of your train?

A. We left the other half of the train away on the top of the hill; we hauled the train five miles before we got to Vernon.

Q. And that is where the derail was when you left that first half of the train?

A. Yes, sir.

Q. As you got up to where the derail was, you say Callen was the one who handled it?

A. Yes, sir.

Q. Do you remember when he was getting off the train to [204] set the derail—did you see him get off the train?

A. Yes, sir.

Q. Do you know whether the train was moving or standing still?

A. Moving.

Q. Moving fast?

A. No, sir.

Q. How fast?

A. Well, I got off about a car length further.

Q. But the train was in motion at the time?

A. Yes, sir.

MR. PRICE: Cross-examine.

CROSS-EXAMINATION.

By MR. RICHTER:

Q. Mr. Crum, you are the conductor of this train crew?

A. Yes, sir.

Q. You were in charge of this train crew?

A. Yes, sir.

Q. You are the man who is in charge of the whole operation of this train, everybody takes orders from you?

A. Supposed to.

Q. Where were you sitting when you came backward from Vernon to couple onto these cars?

A. Where was I——

[205] Q. Where were you?

A. In the cab of the engine.

Q. On what side?

A. The left side.

Q. What were you doing there?

A. Watching out.

Q. Watching out for what?

A. Watching along the track and seeing if there were any crossings or stop flags, and so forth, and to whistle for them.

Q. Your job was to aid the engineer, or whoever was driving the engine, in seeing what there was to be seen and passing signals or instructions to him, is that right?

A. A light engine?

Q. Yes.

A. No.

Q. Would you tell him how to go and what to do?

A. I tell the brakeman what to do.

Q. And the brakeman tells the engineer?

A. No——

Q. I am talking about the way the engine was run with the engine going backward; you were maintaining a lookout on your side?

A. Yes, sir.

Q. And who would you tell what you saw?

[206] A. Whatever I saw I would tell——

Q. Tell the engineer. Coming down this road there is a curve on Tiro Hill?

A. When you first get over the hill.

Q. You don't have much vision ahead until you get past that curve?

A. You do on one side.

Q. And what side is that?

A. On the engineer's side.

Q. And that is why you have to maintain a special lookout, "yes" or "no"?

A. Yes.

Q. Coming over, how fast were you coming?

A. I would say twenty miles an hour at the top of the hill.

Q. No doubt about that?

A. No.

Q. And what did you do as you kept on coming closer to the cars, slow down?

A. Yes, sir.

Q. Where did you slow down?

A. Well, it was about, I would judge, where we left the hind end we slowed down at about twenty car lengths.

Q. To what speed did you slow down?

THE COURT: The hind end of what?

[207] By Mr. Richter:

Q. The hind end of the cars you left on the hill?

A. We kept gradually slowing down.

Q. What speed were you going when you were twenty car lengths, or a thousand feet from these cars?

A. About 15 miles an hour.

Q. There is no doubt about that? When you are a thousand feet away?

A. A thousand feet away.

Q. Then what did you do?

A. I told the engineer where the rear end was.

Q. You told him where the rear end was in sight?

A. No, I told him where we left the front end of the rear end.

Q. When did you do that?

A. When we first started back.

Q. Let's get down to what you told him when you got closer. As you came back, did you tell him anything more?

A. No; I didn't tell him anything more, I just watched out on that side.

By Mr. Price:

Q. Didn't you tell him you knew if the cars were in sight?

A. Oh, yes; I told him I could see the cars.

[208] By Mr. Richter:

Q. Did you tell him the cars were in sight?

A. Yes, sir.

Q. You said that to him?

A. Yes, sir.

Q. And what did he do?

A. Put the air on.

Q. And slowed——

A. Slowed the engine up.

Q. How many car lengths were you from the cars when he slowed down to 15 miles an hour?

A. About twenty car lengths.

Q. How many?

A: Twenty car lengths.

Q. To what speed did you slow down to?

A. He kept gradually slowing down.

Q. When you were ten car lengths from the cars, at what speed were you going?

A. I would say not over eight miles.

Q. And when you were five car lengths from the cars at what speed were you going?

A. About two or three miles.

Q. Two or three miles—you remember meeting me before, in Pittsburgh?

[209] A. Yes, sir.

Q. You remember the railroad had a lawyer, and you were sworn in to give testimony at that time?

A. Yes, sir.

Q. Do you remember your testimony which you gave at that time?

A. Partly.

Q. Let us read it to you, and see whether it now coincides with what you now tell the jury.

MR. PRICE: I object to that, unless it is handled in the proper way, with which Your Honor is thoroughly familiar.

If Your Honor would like to see whether there is any substantial contradiction——

MR. RICHTER: This is cross-examination, and we will come to that.

THE COURT: What is the specific objection for the record, so that I can rule on it?

MR. PRICE: We ask Your Honor to look at the testimony before he reads it and see whether you think it is relevant; whether there is any substantial contradiction in it which would entitle him to read the deposition which was taken in advance of the trial.

MR. RICHTER: They are the same thing—you [210] will not be harmed. I see no harm in bringing out the

actual facts that this man testified to in Pittsburgh, and I am coming to the very point I am cross-examining about.

THE COURT: You want to show that on a previous occasion, Mr.——

MR. RICHTER: Mr. Crum.

THE WITNESS: Crum.

THE COURT: When it was more recent in his mind—how long ago was it?

MR. RICHTER: We took that testimony on July 13, 1945.

THE COURT: That was more recent to the occurrence. You want to show on another occasion, sooner after the occurrence, he testified to something else, different, on this very phase?

MR. RICHTER: On this very phase.

THE COURT: You may ask him about it. I will give you an exception, Mr. Price. But, confine your question to that point.

MR. RICHTER: I will.

THE COURT: Note the objection and exception.

By MR. RICHTER:

Q. You were asked this series of questions and you gave the following answers——

[211] THE COURT: Not too fast.

MR. RICHTER: I will read it slowly:

"A. When we went over the top of the hill I would say we were moving 20 miles an hour.

Q. Did you increase or decrease your speed as you moved?

A. We decreased.

Q. At what point did he decrease it?

A. About 15 or 18 cars from the front end of the cars.

Q. About how fast did he slow down to?

A. About 2 miles before he coupled on.

Q. Did he slow down to 2 miles when he was 15 car lengths away from the cars?

A. I wouldn't say he slowed down to 2 miles an hour then.

Q. When did he slow down to 2 miles an hour?

A. About 100 feet.

Q. About 2 car lengths away, before that he had been moving how fast?

A. Just before that, why, he was going about 15 miles an hour."

Didn't you testify that?

A. Two car lengths away?

Q. Yes, didn't you, under oath, before the official court [212] stenographer say when your engine was only two car lengths away your engine was going 15 miles an hour?

MR. PRICE: He didn't say any such thing.

MR. RICHTER: He certainly did.

MR. PRICE: I never heard it, I never heard any such thing. That is why I asked Your Honor to look at this testimony.

THE COURT: That might be subject to that interpretation, but there is another interpretation. He said just before that; he doesn't say, as I get it, that two car lengths away the train was going 15 miles an hour.

MR. PRICE: Of course, he didn't.

MR. RICHTER: I will read the question——

THE COURT: Read the whole thing.

MR. RICHTER: Very well.

THE COURT: And not too fast.

MR. RICHTER: "Q. Did he slow down to 2 miles when he was 15 car lengths away from the cars?

A. I wouldn't say he slowed down to 2 miles an hour then.

Q. When did he slow down to 2 miles an hour?

A. About 100 feet.

Q. About 2 car lengths away, before that he had been moving how fast?

[213] A. Just before that, why, he was going about 15 miles an hour."

THE COURT: There is nothing further that throws any light on it?

MR. RICHTER: On that phase, that is all I have, Your Honor.

THE COURT: All right.

By MR. RICHTER:

Q. You did testify exactly as I read from the notes?

A. I wouldn't say that I testified that it was going 15 miles an hour two car lengths away from the cars.

Q. You don't recollect?

A. No, sir.

Q. Now, Mr. Crum, somebody has to make the coupling?

A. Yes, sir.

Q. Who made it?

A. The brakeman.

Q. The brakeman made the coupling from up in the shelter box?

A. No.

Q. He has got to get down on the ground?

A. He does, to make the coupling.

THE COURT: We are trying to get the railroad strike news—this is off the record.

[214] (Remarks off the record.)

By Mr. Richter:

Q. Now, Mr. Crum, it was Mr. Callen who was on the ground and made this coupling?

A. I don't know.

Q. He was the brakeman who was there?

A. Yes, sir.

Q. The other brakeman had been left behind to protect the rear?

A. Yes, sir.

Q. And the only brakeman who was available to make this coupling——

A. That was his place but I didn't see him.

Q. You know the coupling was made, don't you?

A. Yes, sir.

Q. In point of fact, what is the fastest speed which an engine could make a coupling with cars?

A. I wouldn't say over two miles.

Q. If he was going faster, it would be a hazardous affair?

A. Yes, sir.

Q. It would be a dangerous speed?

A. Any high rate of speed——

Q. You were telling us about these members of the crew, the train crew and the engine crew. You made a note about [215] everybody that was working with you?

A. In my time book.

Q. You made a note in the time book?

A. Yes, sir.

Q. If an accident occurs, do you make a note in the time book?

A. Yes, sir.

Q. You don't have anything written about Mr. Callen having been hurt at the derail?

A. No, sir.

Q. You had nothing written, about him saying he had been hurt shoveling snow?

A. No, only his own word.

Q. When was the first time you were ever asked about this accident?

A. When——

Q. When was the first time the railroad asked you about this accident?

A. Oh, about June.

Q. Around June?

A. Yes.

Q. Who was it asked you, the claim agent?

THE COURT: None of what?

MR. RICHTER: June, he said, Your Honor.

[216] THE WITNESS: June of 1945.

By MR. RICHTER:

Q. There was a claim agent who talked to you about it?

A. He did.

Q. It was a claim?

A. Yes, sir.

Q. It was then you made your first statement?

A. Yes, sir.

Q. Even though Callen had not reported it, wasn't it your duty to report the accident about the derail as soon as you did learn about it?

A. No, sir.

Q. Aren't you supposed to report accidents that occur?

A. No, sir, not at that time.

Q. You have a rule that accidents should be reported within 72 hours?

A. But that was more than 72 hours.

Q. That is the duty of the man himself, but your duty as conductor of the train, regardless of the failure of the employee to notify the company about it, was to notify the company immediately as soon as you learned about it, wasn't it?

A. Well, I didn't know anything about it only what he told me.

[217] Q. He told you on the 20th he had been hurt as a result of the derail?

A. Yes, sir.

Q. Why didn't you report it, so that the company would have a record, that Mr. Callen was supposed to have gotten hurt?

A. I couldn't swear that he got hurt.

Q. You couldn't swear other than what the man told you that he got hurt, could you?

A. What?——

Q. You never knew of your own knowledge that the man was actually hurt in a certain way unless you see the accident?

A. You see, on the derail——

Q. Just listen—a man may be hurt on the back of the train, and you are 80 cars off, and he comes up and says "I just got hurt". You wouldn't know whether that is true, only what he tells you?

A. Yes, sir.

Q. Nevertheless, you report those things?

A. Oh, sometimes according to how bad he gets hurt; if he gets a little bump, you don't.

Q. You decide to neglect those things?

A. In that respect, yes.

Q. You are supposed to report every accident?

A. Well, yes.

[218] Q. So that the company will have a——

A. If you know it in time.

Q. When you learned from Callen, as you claimed you did, on the 20th of December, he told you he had been hurt by the derail, you were supposed to report the exact wording of what he told you so that the company would have a record of what he said or claimed, isn't that right?

A. Well, I wouldn't say.

MR. RICHTER: That is all, Mr. Crum.

THE COURT: Will somebody ask Mr. Crum what he told the claim agent about this?

By THE COURT:

Q. Did you make a report to the claim agent, Mr. Crum?

A. Yes, sir.

THE COURT: Is that report in evidence, or going to be offered in evidence?

MR. RICHTER: I never seen it, Your Honor. I am not interested in it.

MR. PRICE: If Your Honor would like to have it, I have it here.

THE COURT: Let me look at it please.

MR. PRICE: Certainly, I will be glad to. I will be glad to show it to the jury if they would like to see it.

[219] THE COURT: Just excuse me just a minute. (Court examines same.)

This is dated the 27th of June, and after having read it, do you mind if I say it is substantially in accord with his testimony today.

MR. RICHTER: I have no doubt that it is.

THE COURT: If you want to offer it, it is in more detail, but it is substantially the same as the sworn testimony that he has given from the stand.

MR. RICHTER: I object to it, because it is self-serving.

THE COURT: If either side wants it, all right. If you don't think it is necessary to insert it in the record—it is quite lengthy,—but it is probably all right.

MR. RICHTER: I just objected to it.

THE COURT: But it is substantially in accord with his testimony.

MR. RICHTER: Naturally.

I just want to ask a few more questions, something that just occurred to me.

THE COURT: All right.

By MR. RICHTER:

Q. Now, was Callen supposed to make this coupling?

A. He was there.

[220] Q. And he made the coupling?

A. I wouldn't swear to that.

Q. When you were asked this question,—this is on page 16, Mr. Price,—"Who made the coupling", and the answer, "Callen"; and then the next question, "He did make your coupling"? And the answer, "Yes". You testified that way before?

A. Well, that was his place to make the coupling if he was there, but I didn't see him.

Q. Why did you testify that it was Callen, positively, who made the coupling?

A. I didn't testify positively.

Q. You were asked who made the coupling, and you said Callen. "He did make your coupling"? And you said, "Yes." You testified that way?

A. I would judge he would, but I didn't see him make the coupling.

Q. You judge he would? Anyway, it was his job to do that?

A. Yes.

Q. And it was his job to pass signals?

A. Yes, sir.

Q. If he were to have stayed up in the shelter box, you wouldn't see him?

A. No.

[221] Q. The only place you could see him would be if he got down on the engineer's side?

A. I couldn't see then,—I was on the other side.

Q. I know. But, the place for him to stand, so that he could be seen was in a conspicuous position on the stirrup on the side of the tank?

A. Yes, sir.

Q. That is where he was supposed to stand?

A. Part of the time.

Q. So that he could pass signals?

A. Coming back, but not very far. If the engine stopped he could get down off the engine and could get on the stirrup and ride back and couple it on.

Q. He got down soon enough so that he could be on the ground floor?

A. He didn't have to be back there before they came together.

Q. He has got to check on the jaw of the coupler to see that it is all right?

A. He can come down and see if it——

Q. Does he come out of the shelter box?

A. Yes.

Q. He is supposed to come down from the shelter box while the engine is in motion?

[222] A. No, he isn't.

Q. What do you do if the jaws will not couple up?

A. Stop and flag the engine.

Q. You don't have to get down and——

A. You can see from the top of the tank.

Q. But he has got to get where he can be seen?

A. Yes.

Q. And where he could give signals?

A. He is on top of the tank, and can give signals.

Q. You would have to climb over the tank for that?

A. He didn't need to climb over the tank, he can walk from the shelter box and hold on to the guard rail on either side of the shelter box, not on the side of the tank.

Q. This book you have there, you are not sure whether they stalled on Tiro Hill,—whether it was the 10th or the 14th?

A. Not on the 14th.

Q. You say it was the 10th?

A. That is right.

Q. And you say Mr. Callen was in error when he asserts that it was on the 14th?

A. That is right.

Q. There is no doubt you crossed some railroad crossing,—what is that, the Nickel Plate?

A. No, sir, that is the——

[223] Q. What is the name of that crossing?

A. The Big 4.

Q. Do you remember the occasion when Mr. Callen had to call to keep on across, that the crossing watchman——

A. There was no crossing watchman there.

Q. Or the tower man——

A. The operator.

Q. The operator,—remember that occasion?

A. Yes, sir.

Q. And he kept on shouting to you fellows to go on across?

MR. PRICE: I object to this. Yesterday Your Honor ruled all of this out——

MR. RICHTER: No, it shows the attention or inattention of the members of the crew to——

MR. PRICE: If I may finish my statement to Your Honor without being interrupted.

Your Honor ruled out a question and answer by Mr. Callen when Mr. Richter attempted to bring this in yesterday, and I object to any further reference to the matter.

THE COURT: Mr. Richter, do you think it is necessary to go into that? It is a close question, that Mr. Price has raised, and I think the weight is in his favor. I don't want to shut out anything, but it is a close [224] question and I think I should sustain the objection unless you can show a very urgent reason.

MR. RICHTER: I think I have good reason involved, but with respect to Your Honor's thoughts on the question I will withdraw the question.

That is all, Mr. Crum.

MR. PRICE: I have something more.

THE COURT: I hope you will have another 46 years service.

MR. PRICE: I am sorry, I am not quite through yet.

THE COURT: One more question, Mr. Crum.

THE WITNESS: Excuse me.

RE-DIRECT EXAMINATION.

By MR. PRICE:

Q. You were asked a few minutes ago by Mr. Richter, something about Callen passing signals when he was on top of the tank or the side of the tender, I don't know,—it isn't very clear and I didn't hear you at the end; you said that Callen could pass signals but he didn't have to get down until the engine came to a stop. Will you explain that?

A. He can crawl out of the dog house,—there are grab irons all around the dog house,—he can hold on to them and give the signals with the other hand.

Q. That doesn't involve climbing down the side of the tank?

[225] A. No.

Q. Is he permitted to climb down that ladder when the train is moving backward?

A. No.

Q. When you said he had to pass signals, do you mean he had to hang out on the side of the tank in order to pass them?

A. No.

Q. Mr. Rosser testified a man had to hang out there as much as ten miles?

A. I heard the gentleman.

Q. Is there anything like that on your railroad?

A. No, sir.

By THE COURT:

Q. Would you say under the circumstances that he described, running against traffic and so forth, you disagree with him on that? He didn't say in a coupling operation he might ride ten miles on the stirrup, but in running against traffic, and he gave his reason. Would you say that would or would not be good railroading?

MR. PRICE: With a light engine.

MR. RICHTER: And a tank.

THE COURT: Under the condition that he described, going against traffic.

THE WITNESS: No; I would say not with a light [226] engine.

THE COURT: I don't know how the passengers would feel. I think we would feel more secure if they followed the other method. If you disagree, we will have the jury take both phases of it.

MR. PRICE: I would like to note my objection to Your Honor's statement, it being improper in this case, for the reason that passengers would have nothing whatever to do with the moving of a light engine, and Your Honor's suggestion that passengers might be better protected by that kind of an operation is entirely improper. No passengers are involved here, and I note my objection.

THE COURT: I am referring to the testimony of the witness yesterday, the employee of the Reading Company—I forget his name,—in relating his experience of what constitutes good railroading, he said that in running against traffic he himself had stood upon the stirrup to signal or watch out, for reasons that he gave,—possibly, that the tower man might make a mistake,—that that was good railroading or considered good railroading in the railroad world and he himself had done it.

I asked Mr. Crum if he considered that good railroading and he said "no," and I say that passengers might have a very different idea whether or not, in the [227] interest of safety, that was or was not good railroading. The railroad men don't agree, but there is no reason why the jury should not have its own ideas about it, and I am leaving that to the jury; that has nothing to do with this case, which was a coupling operation. You brought this up.

MR. PRICE: Your Honor, in view of Your Honor's statement, I move for withdrawal of a juror.

THE COURT: I will not withdraw a juror, and I will give you an exception. We are trying a case involving a coupling, and not a case involving railroading under the conditions that were mentioned yesterday, and I want the jury to understand that the two illustrations, the two instances, are separate, wide apart, and distinct.

I asked Mr. Crum what he thought, and he has given us his opinion, and you have the opinion of the preceding witness of yesterday, and you are going to be the judges of it,—I am going to leave it entirely to you.

All right, go ahead. Any more questions?

MR. PRICE: Yes, sir.

By MR. PRICE:

Q. When was the first time that it would have been proper for Mr. Callen to get down out of the dog house when your engine was backing up toward this stand of cars?

A. After the engine stopped, or after we coupled on.

[228] Q. You said after the engine stopped?

A. Yes.

Q. He should have gotten down before the engine came to a stop?

A. No.

Q. You were on the left side of the engine at all times until after the coupling was made?

A. Yes, sir.

Q. That is the fireman's side?

A. Yes, sir.

Q. The opposite side from the engineman's side?

A. Yes, sir.

Q. Was there any damage done to any equipment when you made this coupling?

A. No, sir.

MR. PRICE: That is all.

MR. RICHTER: No questions.

THE COURT: That is all, Mr. Crum.

MR. RICHTER: One question, Mr. Crum.

RE-CROSS-EXAMINATION.

By MR. RICHTER:

Q. You are still working for the railroad, Mr. Crum?

A. Yes, sir.

Q. What is your answer?

A. Yes, sir.

MR. RICHTER: That is all.

[229] MR. PRICE: Mr. Triem, please.

W. R. TRIEM, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. PRICE:

Q. Mr. Triem, you are connected with the Pennsylvania Railroad Company in some capacity, tell us what that is?

A. Yes, I am General Superintendent of Telegraph of the Pennsylvania Railroad, with my headquarters at Philadelphia.

Q. How long have you been connected with the Railroad.

A. I have been connected with the Railroad since 1910, 36 years.

Q. In the course of that connection with the Railroad, will you just briefly give us the kind of experience you had with the railroad, what your various jobs have been?

A. Yes. After graduation from Ohio State as Civil Engineer in 1910 I worked in the Engineering Department in various capacities beginning with Assistant Division Engineer; from that position I was made Assistant Trainmaster, and then Trainmaster; then Division Superintendent on two divisions; Superintendent of Freight Transportation; and then General Superintendent of Telegraph in Philadelphia.

Q. In the course of that experience have you had anything [230] to do with the various rules, either in the drafting or enforcement of the operating rules of the railroad?

A. Yes. Since 1924 I have been intimately concerned wtih the operating rules of the Pennsylvania Railroad as an instructor and as enforcer of the rules.

In 1936 I became chairman of the so-called System Train Rule Committee, which has to do with the formulation and interpretation of the rules of the Pennsylvania Railroad.

Q. Have you anything to do with the rules with regard to what has been referred to yesterday, I think, as national rules or general rules that govern the whole United States?

A. Yes. The so-called standard code is a standard code of rules prescribed by the American Association of Railroads for the General Guidance of all Railroads; and I am chairman of that committee, and have been connected with that committee since 1936.

Q. Are you familiar with Rule 103 and 103a of the Pennsylvania Railroad?

A. I am.

Q. Is Rule 103 applicable to any other railroad, or, is that a standard rule, or is it peculiar to the Pennsylvania Railroad?

A. No, it is not peculiar to the Pennsylvania Railroad. [231] It is the same number that is used in the standard code, and since all railroads pattern after the standard code it is safe to say that the same number is used for the same subject on all railroads, but not necessarily the same wording.

Q. Are you familiar with the wording of the rule as used on the Reading Company?

A. No, I am not.

Q. Are you familiar with it as used on the Pennsylvania Railroad?

A. Yes.

Q. Have you got the rule with you?

A. Yes, sir.

Q. Will you read it, so that we are sure we know what you are talking about.

A. Rule 103 was made effective on the Pennsylvania Railroad, September 28, 1941, and incidentally, was changed from what it had previously been at that time.

The rule reads:

> "When cars are pushed by an engine and the conditions require a trainman must take a conspicuous position on the leading car under such circumstances if signals from the trainman cannot be received by the engine crew the movement must be stopped immediately unless a brake valve and an alarm whistle on the leading car are being used."

[232] Q. Does that rule apply in any respect to a movement of a light engine, that is, an engine without any freight cars attached?

A. No; that rule does not apply to a light engine.

Q. Would it apply to an engine and tender?

A. When I use the term light engine, I include the tender as part of the unit.

Q. Does an engine operate without a tender?

A. An engine could operate for a few minutes without a tender, but only as long as the coal and water supply would permit.

Q. But an engine and tender is considered one unit for the purposes of this rule?

A. Yes, and under the rules the term "engine", and all matters pertaining or referring to engines in the rules, includes the tender as a part of the unit.

Q. So that when the rule refers to cars, would the cars referred to in that rule include the tender?

A. No, unless it was a unit,—if a tender was being moved separately.

Q. Independently of the engine?

A. Independently of the engine itself.

Q. Yesterday there was a Mr. Rosser testified, in substance, when a light engine moves in that sort of movement it was the [233] duty, under his interpretation of the rule which he read, although it was the Reading Company and not the Pennsylvania,—it was Rule 103,—that a brakeman should ride on the side stirrup on the side of the tank as this engine was moving backward in order to pass signals; is that right?

A. That is not required under Rule 103.

Q. And what about Rule 103a?

A. It is not required under Rule 103a, which has to do on the Pennsylvania Railroad,—I don't know about other railroads,—but on the Pennsylvania Railroad Rule 103a has to do with switching over crossing not protected by crossing watchmen or gates.

Q. Will you read 103a?

A. "103a. When a train is shifted over a public crossing at grade not protected by a watchman nor by gates a member of the crew must protect the crossing in advance of each movement over the crossing unless otherwise provided."

Q. Now, there was evidence here that there was a train which was cut at a country road crossing, and one end of

the draft was left blocking the road crossing, and this engine was coming back to couple up to that standing draft of cars; does Rule 103a apply to that situation?

A. No. 103a would not apply to a blocked crossing.

Q. Or to a coupling being made by an engine to the cars [234] which were standing, blocking the crossing?

A. Neither 103 nor 103a have anything whatever to do with coupling.

Q. Now, Mr. Rosser also testified yesterday, in his opinion it was required and would be proper for a man to ride as much as ten miles, hanging on to the side of a tank of a light engine if the engine were moving, making a road movement, against the current traffic; would any such thing as that be—

MR. RICHTER: He didn't say that. He said if they were making a movement against the current of traffic——

THE COURT: Ask Mr. Triem if he was present yesterday and heard Mr. Rosser testify.

MR. PRICE: He wasn't here.

THE COURT: He wasn't in court?

MR. PRICE: No, Your Honor. I am going to ask him if——

THE COURT: Then it is in the nature of an opinion, —it is a sort of hypothetical question. As I said a minute ago, we are not trying that kind of a case. If you want to use Mr. Triem's judgment to impeach the credibility of the witness who testified yesterday, I will permit this question.

MR. PRICE: That is the purpose of it.

THE COURT: The introduction of that testimony [235] yesterday was rather quite off the mark, because the jury isn't passing on a condition of that kind. It was permitted just to give the expert the opportunity to testify generally as to what the duties and responsi-

bilities of a brakeman might be under various circumstances,—but, we are not trying that kind of a case here. I am not sure that your question that you put to Mr. Triem embodies all the elements that Mr.—what is his name?

MR. PRICE: Mr. Rosser.

THE COURT: Yes, Mr. Rosser,—I am not sure that your question embodies all the factors that Mr. Rosser sets forth as to the reasons why he had, in a given circumstance, ridden as far as ten miles going against traffic.

Now, if Mr. Triem understands that and—first of all, has Mr. Triem been a railroader?

MR. PRICE: He has been a railroader for 36 years.

By THE COURT:

Q. And have you been out on trains on the firing line of the railroad?

A. I have been assistant trainmaster, trainmaster, and division superintendent.

Q. And have you ridden on trains?

A. Oh, my, yes.

[236] Q. As brakeman?

A. Not as brakeman or conductor.

By MR. RICHTER:

Q. As what?

A. As assistant trainmaster.

Q. Have you ever operated trains as flagman or conductor?

A. No, but——

Q. Or as a brakeman?

A. No.

MR. RICHTER: Then, I object to his testimony.

THE COURT: He is undoubtedly versed in the purposes of the rule and its theory. The jury will bear in mind what position he occupies in the railroad world

and the position of the men who are out on the firing line. You will take all these things into consideration whether Mr. Triem understands the general facts that Mr. Rosser gave yesterday, and I think he ought to be permitted to answer the question.

MR. PRICE: Well, let us first see how many times he has ridden on freight trains.

THE COURT: You can outline the circumstances in substance, and embody all the elements which Mr. Rosser had, and put it to him in that way.

By MR. PRICE:

[237] Q. Tell us what experience you have had, actually, on moving trains and making couplings and that sort of thing as a part of your duties on the railroad for some time?

A. It has been a part of my duties to ride on and be about trains during practically all my experience up to 1936 as assistant engineer, as the man in charge of work trains, and assistant trainmaster—and I have ridden both on locomotives and in cabin cars, and on the middle of trains; I have been in and about yards for days on end.

I am illustrating that, if you please, because I wish it to be understood that I feel I have first-hand knowledge of actual working conditions on the railroad.

Q. And trainmen, that is, crew men, conductors, firemen, engineers, brakemen, all work under you—you are their supervisor on the railroad in these various capacities?

A. I have been their superior in all crafts and instructed them in their duties, and questioned them as to the rules, and promoted them to their various capacities.

Q. You pass on their qualifications for promotion to different jobs?

A. That is correct.

Q. You were asked whether you were present yesterday when Mr. Rosser testified, and I know you were not here——

A. No.

[238] Q. And I ask you whether you read his testimony that he gave yesterday?

A. I looked it over this morning, yes.

By THE COURT:

Q. Looked what over?

A. The testimony.

Q. The testimony of Mr. Rosser?

A. Yes.

Q. On page 131 (indicating)?

A. Relating to running against the current of traffic—that is the page.

THE COURT: That ought to be stated to him. Suppose you read that to him, Mr. Price, so that it gets in the record at the right place.

MR. PRICE: Yes, sir.

Q. You can begin any place you wish——

MR. PRICE: On page 130——

THE COURT: Running against current traffic seems to embody what you would want.

MR. PRICE: Where he said about one mile or ten miles on page 130.

THE COURT: Any part you want to take it up from.

MR. PRICE: I asked Mr. Rosser about a man to [239] ride on the steps of the tender on a light engine movement, and I said, "But, I am asking you when he should take that position?" "That is up to him. That is a matter he can control." "A. The rule says he shall take a conspicuous position, it doesn't say when the engine starts back or not—" "Q. But it is up to him to decide when he should do it?" "A. If anything should happen, as I said, before he got back there and there was any depredation, then he is charged with violating the rule because he isn't there, therefore, I

say, as an expert, and as I instruct every man—he is supposed to go on the back of the engine, whether it is one mile or ten."

Do you agree that would be the proper operating position for a man to ride, one mile or ten, on the stirrup of a light engine that was backing up on a road movement?

MR. RICHTER: He didn't put in that question the——

THE COURT: Mr. Price isn't finished yet.

THE WITNESS: No, it would not be proper.

By MR. PRICE:

Q. And then going on:

"Q. You would have a man ride ten miles on the stirrup of the engine, is that right?

[240] A. Yes—and I have done it myself.

MR. PRICE: That is all.

MR. RICHTER: That is all, Mr. Rosser. Thank you.

THE COURT: Just one minute, Mr. Rosser. So that we will have no misunderstanding later on, I think we all agree riding ten miles on the stirrup of an engine or tender seems rather large, but we can all visualize a case, probably, where the roadbed would make things uncertain, but what would be the general condition which would cause you to ride ten miles, a washout or for observation of the track or——

THE WITNESS: Running against other traffic.

By THE COURT:

Q. Whether or not the statement is rational or too general—but, what do you mean?

A. Running against current traffic. It is quite often you have to run—in which case you are issued a TD, or train order number 19, and you make a run

between—it all depends on the length between towers, from one tower to another—it may be one mile or it may be ten miles—and it then becomes your duty as brakeman to place yourself in a position, because you are going on this train [241] order to run against the current of traffic—you must be in position, because if some man slips at the other end and lets an engine in——

Q. You mean running on the left-hand track instead of the right-hand track?

A. That is right.

Q. And a train might come in the opposition direction?

A. You have received orders to run against current traffic; no human is infallible, and these orders are transmitted between one point and another, and by the time these orders are transmitted, this may make a mistake and let the man along the line with the current of traffic who doesn't require an order, and therefore it requires a man to protect that movement."

and riding on the stirrup of a light engine.

[242] Would you agree, either going against current traffic or not, on a road movement one mile or ten, that it would be proper for a man to ride on the stirrup of a light engine on such a movement?

A. It would not be proper and it is not required under any of the rules.

THE COURT: He didn't say whether it was required—but, would it be improper to do that? The rules, as was pointed out yesterday, can't say everything that should be done on the firing line of a railroad activity, but the question is, would that be bad railroading or good railroading under the circumstances that have been described, not what the rules require. Would the rules forbid it?

THE WITNESS: The rules do not forbid it, but, if I may explain, I would say that the practice is improper.

THE COURT: Impossible or——

THE WITNESS: Improper.

THE COURT: Improper.

THE WITNESS: The reason I would say it is improper is that a light engine is completely under the control of the engine man, and there is a fireman and an engine man on the engine each looking toward the rear to see the conditions to the rear of them as they are moving along, and the vision is sufficient for them to see an approaching train or [243] some obstacle that would interfere with their movement, and the presence of a brakeman standing on the stirrup of an engine not only is extremely dangerous, but particularly in inclement and cold weather it would tend to take the responsibility away from the engine man and put it in the hands of the brakeman who would have no better vision in many instances not as good vision, because of the wind, dirt, and cold weather, than the men who are up in the engine.

THE COURT: Anything further?

MR. PRICE: Does that answer Your Honor's question?

THE COURT: This is off the record.

(Announcement by the Court, off the record.)

THE COURT: Any more questions, Mr. Price?

MR. PRICE: Yes, sir.

By MR. PRICE:

Q. I will ask Mr. Triem whether it would have been proper for Callen, or anybody else, riding in the doghouse on a light engine, moving backward, to get down out of the

doghouse and descend over the back of the tender and on the side stirrup before the engine came to a stop?

A. No, it would not be proper for him to do that.

Q. When a man is up in the doghouse or riding on top of the engine, is there any place he can go or move to and see where [244] the engine is going and still pass signals to the engine man?

A. Yes; the shelter is so arranged that he can move out of the shelter and over to either side of the rear of the tender and from that vantage point look forward or backward; and it is particularly useful in looking back over the train while the train is moving forward.

Q. Is there anything to hold on to in that position?

A. There is what we call a grabiron, safety handholds arranged all around the shelter so that he can hold on to it with one hand and still be far enough toward the right or the left of the engine so that he can see up and down the track.

Q. How far forward of the rear face of the tank is the rear face of this shelter?

A. I can't tell you exactly, but it is from two to three feet between the rear of the tender and the door of the shelter.

Q. And the shelter itself is approximately how long fore and aft?

A. Probably four or five feet square.

Q. And these handholds are places that you could hold on to and go all the way around?

A. They go all the way around the shelter and are about shoulder high or a little beyond that.

Q. Are they horizontal or vertical?

[245] A. Horizontal.

Q. You speak about a light engine being considered a unit; on this particular kind of engine where is the engine man with reference to the extreme front and the extreme rear?

A. Well, I know this must have been a steam engine, and the engine man is in the——

Q. It is a J-1.

A. J-1—the engine man is in almost the exact middle of that unit. It is as far, I imagine, if not further from where he is sitting to the front of the engine than it is from where he is sitting to the rear of the engine—just about in the middle.

Q. Would the presence of a man on the rear tank or down on the stirrup be any more required than the presence of a man near the cowcatcher forward?

A. No, there would be no more reason for putting a man on the rear than to put a man out in front.

MR. PRICE: Cross-examine.

CROSS-EXAMINATION.

By MR. RICHTER:

Q. What is the purpose of Rule 103, Mr. Triem—is it Mr. Triem?

A. Triem.

Q. What is the purpose of Rule 103?

[246] A. The purpose of Rule 103 is to primarily protect the movement of a train with cars in order that the signals from the man on those cars can be given to the engine man. The fact that our rule says—it makes it optional—shows that we have never felt it was a very essential rule.

Q. As a matter of fact, practically every railroad has the same rule, along the same import?

A. Yes.

Q. And the purpose of the rule is to give the engineer an opportunity to learn that which he can't see himself, isn't that it? He can't tell what is going on the back of the train, and therefore a brakeman gets out to pass signals to him?

A. That is correct.

Q. And the reason he can't see is because there is a box car, let us say, like next to the tender and it blocks his view?

A. No——

Q. How far can the engineer see looking backward if there is a box car next to the tender? Can he see what is on the track back of the box car?

A. Yes.

Q. How far out does the box car extend?

A. It all depends on the length of the box car—say, [247] 50 feet.

Q. I am talking about the width of the box car——

A. Probably five feet from the center of the track.

Q. On each side?

A. On each side.

Q. And how about the cab of the engine?

A. The cab of the engine is out five and one-half feet, about.

Q. Almost the same?

A. Approximately the same.

Q. So, if there is a box car there the engineer can't see beyond the line of the box car?

A. Yes.

Q. Doesn't the box car block his view?

A. No.

Q. Isn't it a fact that the real reason for this Rule 103, Mr. Triem, when you get anything in back of the engine that will block the view of the engine man, a trainman must go down to take signals from whoever is at the rear end so that the signals can be passed on to the engineer?

A. No.

Q. That is not the purpose of the rule?

A. No—I will show you why it isn't.

Q. The import is the same?

[248] A. The import is when the condition is such that the engine man can't see within his range of vision at the speed he is moving, then there should be somebody out on that draft of cars, but the size of the box car, or three or four cars, or six or eight cars, doesn't have any bearing on it.

Q. Ordinarily, when you are pushing ten cars, do you have a brakeman ride on the end of the cars, riding backward?

A. Generally not,—no, not with ten cars.

Q. With how many cars?

A. It depends on whether there is a crossing or the local conditions,—it might be safe to move probably twenty cars under particular local conditions.

Q. Do you mean to say,—let us take Washington Avenue in the City of Philadelphia, 15th Street, or 13th Street, or in between blocks, in a situation where the engine is pushing two or three cars, do you mean to say you wouldn't put a flagman either at the head of the cars or at the end of the draft if the engine is pushing these cars backward?

A. I don't know the situation.

Q. You know Washington Avenue,—the street and the traffic?

A. No, I don't know Washington Avenue at all.

Q. You know that you have your tracks there?

A. Not to my knowledge.

Q. Doesn't the Pennsylvania Railroad run on Washington [249] Avenue in this city?

THE COURT: Mr. Triem is from Pittsburgh——

By MR. RICHTER:

Q. You are from Pittsburgh?

A. I am in Philadelphia.

Q. And you are in charge of these rules?

A. I am not in charge of the right-of-way and the individual crossings, of which there are several thousand on the Pennsylvania Railroad.

Q. You know about the Washington Avenue freight traffic in Philadelphia?

A. I have never been on Washington Avenue in my life.

Q. That is where you have the big freight yard, and you have had for many years, at Broad Street and Washington Avenue?

A. I believe there is a station there.

Q. You certainly know all about the traffic that goes on there, and the way they move cars? You are experienced with that, and know about that?

A. I don't know.

Q. You don't know anything about that. Let's go down to Delaware Avenue and Federal Street——

A. I don't know anything about that.

Q. You don't know,—that is where you have the big receiving yards for loading and unloading?

[250] A. I will take your word for it.

Q. But you are in charge of the Pennsylvania Railroad Company's telegraph department and are familiar with the rules——

THE COURT: But, Mr. Richter, I think we should not go too far afield.

MR. RICHTER: I will cut it down. You want to take the hounds off the fox to chase the rabbit. This whole thing has gone a little bit down a by-way. I do not want to exercise my discretion to close the door on anything, but I don't want it too wide open so that we get off on a tangent.

MR. RICHTER: All right, I will not follow that any further.

THE COURT: Of course, I feel a little hesitant to caution you, because a good bit has already been said, but, I think, we have gone along that line probably as far as we ought.

MR. RICHTER: Very well.

By MR. RICHTER:

Q. Let us go back to Rule 103a. Wherever there is a road crossing is it or is it not necessary that a brakeman be there to protect the movement as the cars are coming back, at the road crossing.

A. If a road crossing is to be crossed by the cars that [251] are being shifted, there should be a man ahead of the shifting movement.

Q. All right. Now, let us say that you have no cars, that you just have an engine and tender, must there not be a man moving with the engine as it goes across the crossing just the same as if it is shifting cars across the crossing?

A. An engine?

Q. Engine and tank.

A. No, not under Rule 103a.

Q. Not under Rule 103a?

A. No.

Q. Under what rule do you have to have a man there?

A. No rule that I know of.

Q. You mean you will run an engine across a road in a shifting movement where you intend to couple to some cars standing on the other side of the road and you will not have someone there to watch that movement?

A. In a shifting movement?

Q. Yes.

A. Backing?

Q. Yes.

A. To couple to cars in a shifting movement?

Q. Yes.

A. That wouldn't be required under Rule 103a.

[252] Q. You got cars on this crossing that were standing just about at the crossing with the draw-bar extending out into the crossing, is it or isn't it necessary, or was it or wasn't it necessary on that occasion, to have had a brakeman out there to supervise the movement of the engine and tank backward in that shifting movement to couple up these cars?

A. It was not.

Q. Why wasn't it?

A. Because it wasn't a shifting movement.

Q. You don't call that a shifting movement?

A. No, no.

Q. You don't call it a coupling movement?

A. Yes, that is a coupling movement.

Q. What is the difference between a coupling movement and a shifting movement?

A. Quite a bit of difference.

Q. All right——

MR. PRICE: Tell Mr. Richter what the difference is.

THE WITNESS: A shifting movement involves a movement of cars from one track to another, as you probably all have seen it many times, putting one car on one track, and moving cars across and backing up and putting two cars in on another track, and coming across with cars again,—[253] that sort of an operation, placing cars on different tracks, would be designated as shifting.

In the case of an engine, cut off from a train, and then returning to the train, that is an entirely different kind of operation.

Q. You think that the wording of Rule 103a which says when a train is shifting over a public crossing at grade, that means there has to be some switching, or a switch, to have a watchman?

A. There must be some switch in the vicinity in which these cars are being classified.

Q. What is the rule about protecting equipment to make sure that the coupler is out straight and the draw-bar properly aligned?

A. There is no rule about that.

Q. No one need be there to protect the property of the company in that kind of a movement?

A. The protection of property, that is in the hand of the engine man and conductor.

Q. The train crew is under the supervision of the conductor?

A. Yes, sir.

Q. And in order to provide protection, someone must be there, is that correct?

A. No——

[254] Q. Do you know Rule T of the rule book?

A. Rule T?

Q. "T"——

A. What issue of your rule book?

Q. Well, I am speaking about the rule governing trainmen dated September 28, 1941,—is that the last book?

A. No.

Q. Do you have a later one?

A. Rule "T" was eliminated, I think, about 1942 or 1943.

Q. You have the rule book with you?

A. Yes.

Q. May I look at it, please?

By THE COURT:

Q. Was the same provision embodied in another rule or modified in some way? It must have had some objective when it was put in force, and if the rule was eliminated how did they obtain the objective that brought the rule into being?

A. Your Honor, the rules relating to the specific duties of the employees were found to be so difficult to interpret with all their responsibilities and duties that we took the rules out and assembled them in what is now known, I think, as Rule 106.

Rule 106 says that the fireman and the brakeman will report to their engine man and conductor and will [255] obey their instructions, in order to permit more flexibility. If the conductor tells the brakeman to do something, he must do it, and in the absence of instructions he has no particular responsibility; entirely like a plumber and helper.

By THE COURT:

Q. The intent or purpose of these rules is to protect the public lives and property, and the property of the com-

pany, and insure as nearly as is humanly possible safe railroading?

A. Indeed that is the purpose. And every book of rules that I have had, and that both railroads have, has on the very first page of the book of rules, "Safety is of first importance in the discharge of duty." Everything that a man does on the railroad is supposed to be geared to that idea.

Q. There are certain things that experience in railroading has shown are highly improper and dangerous, and they are forbidden by the rules?

A. That is correct.

Q. And there are certain other things that are considered advantageous and in the interest of safety, and the application of common sense to railroading, and which are embodied in the rules?

A. That is right, yes, sir.

Q. The rules, of course, can't provide against every emergency that might arise in the hazardous life of [256] railroading, that is correct?

A. That is correct.

Q. So that the railroad personnel is a highly skilled personnel?

A. Right.

Q. And the railroad expects the highly skilled personnel to act in given circumstances where the rules cannot, by reason of the circumstances, say what should be done by rule of thumb, and they expect their employees to have the ability and common sense and wisdom to act in accordance with the circumstances in the interest of safety and the guarding of life and property?

A. That is true, yes, sir.

THE COURT: I think we understand just what these rules are for, like all rules governing conduct, you can't cover everything.

I think, Mr. Price—so that the jury will know the purpose of all this,—I suppose the idea on both sides

is to show what the rules are and then what the acts committed were, and then if there is a violation of the rules, if any, carries with it a certain judgment on the part of the jury. That is the idea? If there is a violation of the rules, why, you would want to show that. Do you mind telling us for what purpose you are showing what the rules are?

MR. PRICE: I can't answer for Mr. Richter, but [257] my purpose in calling Mr. Triem primarily was to contradict Mr. Rosser, whose testimony I didn't believe yesterday, and I want to get Mr. Triem's testimony on that subject.

As far as the violation of the rules are concerned, I do not think any violation of any rule is a factor in the liability question in this case; it is purely a collateral matter.

THE COURT: We don't want to get into a battle with experts on rules, because we are trying a case of a man who says he was hurt and injured in a certain way. But, we want to find out just exactly what the rules provide with reference to his related action, but we don't want to lose sight of the main issue.

MR. PRICE: I think I objected to the admission of Rules 103 and 103a yesterday when they were offered; but, since Your Honor overruled my objection and permitted the testimony and discussion about them yesterday, this is my answer now.

THE COURT: I think that is very proper,—very good.

Is there anything further?

MR. RICHTER: Just one question.

By MR. RICHTER:

Q. When the engineer and the fireman are inside the cab of the engine, they have a more or less clear view ahead, when [258] they are going ahead?

A. Yes, sir.

Q. That is because the front of the boiler is cut down, and the engineer has a window and can look out straight ahead?

A. That is right.

Q. And when you are coming backward you have a certain amount of blind space between the point where the engineer can see ahead and beyond the end of the tank?

A. About the same as looking forward.

Q. Looking forward you only have the rounded head of the boiler in front of you?

A. Yes, but it extends out about the same distance.

Q. I understand, but I am not talking about the distance, I am talking about the height now. He has a forward window to look out, going ahead?

A. Yes, sir.

Q. And he can look ahead and see?

A. He can only see to the right side of his engine for a long distance ahead.

Q. I understand that, but, as I say, looking ahead all you have the round front or nose of the engine that might block your view ahead?

A. This was a J-1 engine?

[259] Q. Yes.

A. This was a J-1 engine, and that is one of the largest engines the Pennsylvania Railroad has.

Q. One of the big road engines?

A. It is a very large engine, and the view from the engineman's position on the seat in the cab is sufficient to permit him to see objects on the track a considerable distance ahead.

On the other hand, if he has to look to the rear, he would have to put his head out the window and look to the rear. Now, in putting his head out the window to see to the rear, if he did the same thing, going forward, he could see practically as far in either case. That is what I am attempting to say.

MR. RICHTER: All right, thank you.

THE COURT: Now, members of the jury, I am going to release you today. The railroad traffic situation is still not cleared up, and I think we will all feel better if you just go home now, those of you who have to take the train; I am not going to ask you to come back tomorrow morning because we will all be hanging on the ropes, so to speak, and waiting for something to happen. It would not bring about the proper frame of mind for us to do our duty here, because if we are too hot and bothered with the traffic situation we can't come to our jobs with that placid state of mind that the jury box [260] requires.

The main consideration for you twelve men and women should be, and will be, what is the right thing to do in this case. You ought not be bothered and disturbed by the thought if you came tomorrow how you would get home—nothing doing. Now, we will see what happens between now and Monday, and if you don't hear over your radio that the railroads are operating—you will get some word by Sunday—you will get the broadcast—and if the railroads are not operating by Monday morning you will not be here—but, I will recess this case until Monday in the hope that it will be cleared up.

We will have to make some disposition of other cases for all of next week—the judges are going to confer—and there are some things that require only the attendance of local lawyers and parties, but with juries it is different.

I am sorry this interruption occurred, but we just can't help it. I hope you will have a pleasant weekend.

(Whereupon at 12:45 o'clock P. M., an adjournment was taken to Monday, May 27, 1946, at 10:00 o'clock A. M.)

FOURTH DAY.

[261] Philadelphia, Pa., May 27, 1946.

Before Honorable George A. Welsh, *J.*, and a Jury.

Present: B. Nathaniel Richter, Esq., and Joseph S. Lord, 3d, Esq., for the Plaintiff.
Philip Price, Esq., and Scott Seddon, Esq., for the Defendant.

The Court: All ready, Mr. Price?

Mr. Price: Shall I start, Your Honor?

The Court: Yes, sir.

Mr. Price: Mr. Neal.

[262] DEFENDANT'S EVIDENCE (Continued).

LLOYD D. NEAL, having been duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Price:

Q. Mr. Neal, you are employed by the Railroad Company in what capacity?

A. Engineer.

Q. And have been for how many years?

A. I have been employed for 23 years.

Q. On December 10, 1944, were you the engineer of the run which doubled Tiro Hill?

A. I was pilot—engineer pilot.

Q What is a pilot?

A. Well, a pilot is the man who is in charge of the engine when the engineer isn't familiar with the physical characteristics of the railroad over which he is running.

Q. If there is a pilot necessary, and on the engine, can the regular engineer run the engine at all?

A. The pilot engineer is supposed to run the engine unless otherwise instructed.

Q. Otherwise instructed by whom?

A. In the case where the engineer wasn't a pilot, or the [263] pilot wasn't an engineer—which doesn't happen very much.

Q. I am asking, where the pilot is engineer and he is put on the engine to pilot because the regular engineer is not qualified in that territory; who is the one who must run the engine in a case like that?

A. The pilot.

Q. Is there any exception to that?

A. No, sir.

Q. Do you remember whether you ran the engine on the 14th of December?

A. You mean whether I worked on the 14th?

Q. That is right.

A. I didn't work.

Q. On the 10th, that is the time you did double the hill?

A. That is right.

Q. Was that an unusual occurrence to double the hill?

A. That is the first time I ever stalled on Tiro Hill.

Q. After you had cut the train and taken the first half of it to some other place and started back, you came back light, without any cars?

A. We came back with a light engine.

Q. That means without any cars?

A. Without any cars.

Q. How long a run did you have from where you left the [264] first half of the train to pick up the other cars?

A. You mean from where we set the head end off?

Q. Yes.

A. Approximately five miles.

Q. Coming back, and getting to the point where you got in sight of the standing draft of cars, tell us how you operated the engine, and whether Mr. Callen was around on the engine any place, and if so, whether you saw him?

A. When I got within twenty car lengths of the crossing, the cars were in plain view—they were within my vision. When I was within ten car lengths I slowed down to not much faster than a walk, and within a couple car lengths down to much less than two miles per hour, which is very slow. I didn't see the brakeman, or Mr. Callen, until after I coupled on, and not until after the air was turned in the train was he around between the cars and tank.

Q. As you were going backward toward the cars, which side of the engine were you seated on?

A. On the engineman's side, backing, and looking back.

Q. On the right-hand side of the engine looking toward the front?

A. No, I wasn't—I was looking back, the direction in which we were backing.

Q. The direction in which the engine was moving, going [265] backward, on which side of the engine were you?

A. On the right-hand side.

Q. The engine has got a front and back?

A. That is right. The engine was going backward, and I was looking in the direction in which the engine was moving, which was backward.

Q. With regard to the side of the engine you were on, irrespective of whether it is moving or not, the front of the engine has the cowcatcher and the rear of the engine has the tender?

A. That is right.

Q. Imagine you are facing to the front, which side of the engine were you on?

A. The right-hand side.

Q. So that you would be on the left-hand side in the direction in which you were moving backward—all right, well——

A. I would still be on the right-hand side of the engine.

By The Court:

Q. Which side were you on, Mr. Neal?

A. On the right-hand side.

Q. You were on the right-hand side?

A. That is right.

By Mr. Price:

Q. You were looking backward along the right-hand side, [266] looking in the direction in which you were going?

A. That is right.

Q. Did you have any difficulty taking that position or looking backward along the side of the tank?

A. Nothing unusual. Engines are built to run in both directions.

Q. Was the seat adjusted so that you could look either forward or backward?

A. The seat is not movable. I sat with my hand on the throttle, my head against the back, looking backward out of the window.

Q. Is the seat on a pivot so that it can turn?

A. No, it is not on a pivot. It is a leather covered seat with a back rest.

Q. As you were moving backward toward the draft, after it came in sight, did you ever at any time take your eyes off the rear part of the tank in the direction in which you were moving?

A. No, I was watching backward all the time.

Q. At any time did Mr. Callen come down from the doghouse and get out on the stirrup or side step, as he described it?

A. Will you repeat that?

Q. At any time during that part of the trip did Mr. Callen get down from the doghouse clamber out on the outside and [267] hang on to the stirrup of the tank as he said?

A. I wouldn't be able to see the brakeman climb down the end ladder, if he did it while the engine was moving——

Mr. Richter: That is objected to.

By Mr. Price:

Q. I am asking about him getting out on the side?

A. I couldn't see him get down the end ladder, but I could see him on the stirrup.

Q. And was he on the stirrup?

A. No.

By The Court:

Q. Did you see him on the stirrup?

A. No, sir.

By Mr. Price:

Q. I asked whether he was on the stirrup or not——

A. No, sir.

Q. He said he was hanging on the side of the tank or stirrup, standing on the stirrup, and giving you several signals in succession, two or three "steady" signals as he described, and finally the "stop" signal. Did he give you any such signals?

A. There was no one back there.

Q. What kind of coupling device did you have there—must there be someone there to make the coupling?

[268] A. According to Federal Law these couplers are automatic, they couple themselves, and it is not necessary to have a man back there to make the automatic coupling. That is a safety feature.

Q. What does the man have to do after coupling the cars to an engine of that sort? Is there anything you have to do?

A. After the cars are coupled, he has to turn the air on the train.

Q. And how is that done?

A. There are two air hoses that have to be connected and two angle cocks which have to be turned on.

Q. That is a manual operation, that has to be done by hand?

A. That is manual.

Q. Mr. Callen or somebody testified, I think Mr. Rosser, testified that on his railroad different men were required to make a coupling such as he described in this case. Is that so insofar as the Pennsylvania Railroad is concerned?

A. Well, I discussed that with an expert, and I think any Reading man will disagree with him.

Q. What I asked is about the practice of the Pennsylvania Railroad. Do you have to stop to make that kind of coupling, or can you do it without stopping?

A. That is left to the judgment of the engineer.

Q. What was your judgment in this case? Was it necessary [269] to stop or not?

A. No, it was not necessary.

Q. Was there any damage to any equipment on this occasion?

A. None whatever.

Q. Or any complaint about the operation of the cars and how you made this coupling, and was the coupling made without any damage or anything of that sort?

A. None whatever.

Q. When was the first time you saw Callen after you left Vernon on your way back, when did you first see him?

A. When we coupled up the train at Vernon I saw him start for the brakeman's shelter, or doghouse.

Q. You saw him going up toward that?

A. Yes, sir.

Q. And when was the next time you saw him?

A. That is the last time I saw him. I got off at Mansfield. The regular engineer was qualified.

Q. You understood I am talking about between Vernon, going back to pick up the second half of the train?

A. Oh, the second half.

Q. Where was the first time you saw him after leaving Vernon to go back to pick up the second half of the train?

A. I understand—I didn't see him until after we made the coupling and I observed that—I was watching back for

him [270] to emerge between the tank and engine, and after the air was turned in I saw Callen.

Q. When you started back from that point, did you move off right away?

A. I waited until the air was pumped up, and I called in the flag. Do you mean the second half?

Q. The second time.

A. I took off the air and called my flag, but evidently I couldn't move the cars because the hand brakes on the head end were not released.

Q. They were released and finally you went?

A. The conductor told the brakeman to release the hand brakes.

Q. Who was it released them?

A. I couldn't say, but, apparently, it was the brakeman.

Q. And who was the brakeman?

A. Mr. Callen.

Q. The flagman was at the rear end of the train?

A. To protect the rear.

Q. He wasn't up around the engine?

A. No.

Q. And then you went back to Vernon with this second half of the train?

A. That is right.

[271] Q. During that trip did Mr. Callen say anything to you about the way you operated the engine, or disobeyed the signal, or anything of that sort?

A. No.

Q. Did he say anything about getting hurt?

A. No.

Q. Did he say anything about the way he got off the engine, or twisting his back?

A. No.

Q. Did he make any complaint to you of any kind?

A. No, sir.

Q. Did you ever see him again after that?

A. No, sir.

Q. The first time you have seen him since was here today?

A. Yes, sir.

MR. PRICE: Cross-examine.

CROSS-EXAMINATION.

By MR. RICHTER:

Q. Where did Mr. Callen ride on the way back after the second group of cars had been picked up?

A. After the second group was picked up?

Q. Yes.

A. I assume I saw him start for the dog house.

Q. And he stayed there all the way out to Mansfield?

[272] A. No, we had to pick up the other half at Vernon.

Q. After you completed the whole train, and coupled up the whole train, where was Mr. Callen?

A. I saw him start for the dog house.

Q. And that is where he rode all the way in to Mansfield?

A. As far as I know.

Q. How could he talk to you at any time to say anything?

A. He didn't talk to me.

Q. He didn't?

A. Of course not.

Q. He couldn't talk to you because he wasn't anywhere near you?

MR. PRICE: That is not a question,—that is argument.

THE COURT: I think they are in agreement, Mr. Price.

MR. RICHTER: We are in complete agreement, Your Honor.

By MR. RICHTER:

Q. You are an engineman?

A. That is right.

Q. You are not a trainman?

A. That is right.

Q. You have nothing to do with making couplings other than [273] pushing the engine back? You don't drop the pins, or line up the draw bar, or anything of that sort?

A. The couplers are automatic,—the pins drop without handling.

Q. If the couplers are not set straight, who sets them, the engineman or the trainman?

A. The trainman.

Q. You have nothing to do with anything of that kind?

A. No.

Q. Sometimes you stop before you make the coupling?

MR. PRICE: You stop the engine at what time?

MR. RICHTER: You stop the engine before making the coupling?

THE WITNESS: You can, if you care to.

By MR. RICHTER:

Q. You can, depending on what you think is right?

A. It is up to the engineman.

Q. What are the occasions when you think you should stop?

A. The first time on leaving the house, before I ever make a coupling I will stop to make sure.

Q. If a man comes out of the dog house how does he get down to the point where he makes the coupling?

A. There is an end ladder.

Q. Is that end ladder in the center of the tender?

[274] A. It is slightly off center.

Q. Then you come down on the back board?

A. The end sill.

Q. And then you walk out on the stirrup?

A. Then you walk out on the stirrup. From the end sill to the stirrup.

Q. You stay in your engine,—you have an air gauge?

A. Yes, sir.

Q. And that tells you whether the air hose is coupled up?

A. Yes, sir.

Q. And when the air hose is coupled you get some reaction——

A. You can.

Q. And the gauge tells you whether the man has coupled up the air?

A. It tells you when the air is released.

Q. And that is done by the man on the cars?

A. Yes, sir, when he couples up the air.

Q. You sit in your engine, and you see the air registers when the air hoses were coupled?

A. I was waiting until we heard the air cut in the train.

Q. And you heard it?

A. I heard the air cut in.

Q. For that air to register on your gauge, Mr. Callen absolutely had to come down out of the shelter, walk across that [275] end sill, come out on the stirrup, and get down on the ground where you could see him and go in between the cars?

A. That would be the normal routine.

Q. And you say you didn't see him come down, absolutely?

A. Absolutely no——

Q. Where was he likely to be?

A. There are other ways that a man can gripe besides striking——

MR. PRICE: Now, I ask that the witness be given an opportunity to answer the question before another one is put to him each time.

THE COURT: Yes, they come over the plate too fast.

By MR. RICHTER:

Q. To get between these cars to cut in the air, the normal procedure would be to place himself in line where you could see?

A. If he does it that way, yes.

Q. You didn't see him at any time before you saw the air or heard it come through your gage?

A. No.

Q. And Mr. Crum didn't see him coming through?

A. That is Mr. Crum's answer.

MR. RICHTER: That is all.

[276] By THE COURT:

Q. Mr. Neal, we were told the other day that this is one of the biggest engines that the Pennsylvania Railroad Company has.

A. That is right, Your Honor.

Q. A big heavy engine?

A. That is right, Your Honor.

Q. Were you personally familiar with that particular engine? Had you ever run it before?

A. Very well.

Q. This same numbered engine?

A. Oh, yes, the same engine.

Q. You had run this engine before as pilot?

A. Not as pilot but as engineer.

Q. This particular one?

A. That, and the other type. They are the same.

Q. Did you run this engine yourself before?

A. Oh, yes.

Q. And you were the pilot that morning?

A. I was the pilot engineer.

Q. You were not the engineer regularly assigned on that long run?

A. No, sir.

THE COURT: Thank you.

[277] RE-DIRECT EXAMINATION.

By MR. PRICE:

Q. Mr. Neal, I would like you to finish your answer a few minutes ago when you were not given an opportunity

to finish. Tell us how you can get down around on the end sill out of the vision of the engineer, and whether it is frequently done?

A. I wondered why he didn't emerge that way; he could step on the draw bar and then step to the ground, or he could jump from the end sill.

Q. There was plenty of room for that?

A. Yes, sir.

Q. And that is frequently done?

A. Oh, yes.

Q. If somebody alights that way and gets down to the ground in that way, would you be in a position to see?

A. No, you wouldn't be able to see him.

Q. Where are the air hoses he has to couple, in the center of the car or on the outside of the car or——

A. On either side of the draw bar.

Q. And the draw bar is in the center?

A. The draw bar is in dead center.

Q. One on each side, one air hose on each side of the draw bar?

[278] A. Yes, sir.

Q. And can the air hose on the left side of the car be reached from the right-hand side?

A. They are made that way,—they are so placed they can be coupled by all cars, either cars or engines.

Q. Yes, but can a man standing on one side of the draw bar couple both, or does he have to——

A. Do you mean can a man couple the air hose from either side of the draw bar?

Q. Yes.

A. Yes, he can.

Q. Can he couple both air hoses from one side?

A. Yes, sir.

Q. Does he stoop, or squat, or what does he have to do?

A. He has instructions in regard to coupling.

Q. I just want to get the location.

A. He has to stoop.

Q. Is he close to the draw bar or close to the outside of the car?

A. The ends of the hose are underneath the draw bar.

Q. And that is right in the middle of the car?

A. Yes.

MR. PRICE: That is all.

By THE COURT:

[279] Q. Do the rules say anything about who is to take charge of a coupling matter, or coupling operation, when there is a pilot on board? You were pilot, not the regular man on the train, and you made clear the reason why the pilot was there, because of his familiarity with the conditions, but when it comes to a coupling operation do the rules say anything whether the regular engineer should be in charge of the throttle during that operation owing to greater familiarity with the brakes and stopping of the engine?

A. No, the pilot is just as qualified as a regular engineer to do that; he doesn't handle the operation of the engine at any time,—the pilot handles the engine.

Q. Even in a coupling operation?

A. At any operation.

THE COURT: Thank you.

RE-CROSS-EXAMINATION.

By MR. RICHTER:

Q. How high is the end sill from the ground,—about four feet?

A. Let's see,—pretty close to that.

MR. RICHTER: That is all.

RE-DIRECT EXAMINATION.

By MR. PRICE:

Q. How far below the end sill is the draw bar?

[280] A. Just below the end sill.

Q. Are there any steps or anything you can stay on, on the back of the engine behind the end sill?

A. On that type,—you mean from the end sill to a foot board?

Q. Yes.

A. There are no foot boards on that type engine.

Q. And you have to step from the draw bar to the ground?

A. Or jump from the end sill.

MR. PRICE: That is all.

THE COURT: The Grand Jury is coming in presently, and when they come we will rise out of respect for the Grand Jury of the United States. So, when you see me rise it will be the signal for suspension of these proceedings on our part.

(The Grand Jury enters open court, and these proceedings are suspended for a short time.)

THE COURT: All right, Mr. Price.

MR. PRICE: Mr. Hergenrather.

E. O. HERGENRATHER having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

[281] By MR. PRICE:

Q. What is your connection with the Railroad Company?

A. Crew dispatcher.

Q. As crew dispatcher did you have anything to do with the crews that make up particular trains?

A. I make the assignments.

Q. You make the assignments?

A. Yes, sir.

Q. Do you keep any record of those assignments?

A. Oh, yes, the time called, caboose, cars, and of course, the names of the different enginemen, firemen, and trainmen.

Q. Have you got the card record there for ED-3 and ED-4 for the month of December, 1944?

A. I have.

Q. And who made up the crew of the train on December 10?

A. We notified the southbound crew where the cabin was stationed, to call the crew for 1:30.

Q. 1:30 that morning?

A. Yes, sir.

Q. And what was the crew?

A. It was engineman H. D. Hirschmann, W. H. Patterson——

Q. Patterson was what?

A. Fireman.

I will give you the train crew: C. E. Crum, [282] and flagman, J. A. Almond.

Q. Mr. Crum, what was he?

A. Conductor.

J. A. Almond; and brakeman, R. Callen. Engine 6152; call for 1:30. Cabin 477621.

Q. And what about Neal?

A. Neal is the engine pilot, call for 1:30 at that time.

Q. Was that the out movement or back?

A. That is the outgoing movement, called for ED-4, Conway.

Q. When did that train come back,—is that from their home base to go to Toledo?

A. From Toledo to go to the home base, Conway.

Q. This is from Toledo back?

A. Yes, sir.

Q. So that that is the return trip?

A. That is the return trip to Conway.

Q. When was the next outbound trip from Conway to Toledo?

A. Mr. Crum——

Q. No, when was the next outbound trip from Conway to Toledo?

A. On the 12th of December they arrived in Toledo.

Q. What was the make-up of that crew?

A. Well, giving you the engine crew first, that was engineman P. W. VanKirk, and fireman, P. P. Cordis. The conductor, [283] C. E. Crum; flagman, J. A. Almond; brakeman, L. L. Porter. Engine 6167.

Q. Any pilot on that engine?

A. No, sir.

Q. When did that train come back from Toledo to Conway?

A. That left Conway at 1:30 A. M. on the 14th; conductor—I better give you the engineman,—P. W. VanKirk, engineman; and engineman P. M. Carter——

Q. You said engineman twice.

A. Fireman,—conductor C. E. Crum; flagman, J. A. Almond; and L. Porter, brakeman.

Q. Was Callen on that trip?

A. No, sir.

Q. What was the next trip that train took, the next time from Conway to Toledo?

A. They came in on the 16th——

Q. When did they leave Conway?

A. Left Conway on the 16th at 4:00 A. M.; engine 6415. Engineman G. W. Piersol; fireman, H. P. Barber. Conductor, C. E. Crum; flagman J. A. Almond. Brakeman, R. E. Callen.

Q. When did that train come back from Toledo to Conway?

A. They left at 1:30 A. M. on the 14th.

Q. Of what day?

A. 1:30 A. M. on the 18th.

[284] Q. The 18th—the same crew or a different crew?

A. Engineman, G. W. Piersol; fireman, H. P. Barber; engine 6174. Conductor, C. E. Crum; flagman, J. A. Almond; brakeman, R. E. Callen.

Q. That is on the 18th?

A. That is on the 18th.

Q. When did the next train go out from Conway to Toledo?

A. It was called out of Conway at 4:00 A. M. on the 20th. Engineman, J. H. Brock; fireman, H. P. Barber. Engine 6164. Called out at 1:30 A. M. on the——

Mr. Richter: Finish the rest of the train going out of Conway.

Mr. Price: You didn't give the rest of the crew going from Conway to Toledo.

The Witness: That was conductor C. E. Crum; brakeman, R. E. Callen; and flagman, W. H. Haught. Engine 6164.

The Court: Resume at 2:00 o'clock.

(Whereupon at 12:30 o'clock a recess was taken to 2:00 o'clock P. M.)

[285] After Recess.

Present: Counsel as heretofore noted.

The Court: Go ahead, gentlemen.

E. O. Hergenrather, recalled.

Direct Examination (Continued).

By Mr. Price:

Q. Now, all that is left is the trip back from Toledo to Conway?

The Court: Yes, the whole trip.

The Witness: It was called 1:30 A. M. on the 22nd. Conductor, C. E. Crum; 1:30 A. M., 47761 cabin.

By Mr. Price:

Q. And the engine crew?

A. The engine crew was, engineman J. H. Brock, and fireman H. P. Barber.

Q. The same ones that took the train out?

A. Yes, sir.

Q. These documents you are reading from are the official railroad records?

A. Yes, sir.

MR. PRICE: Cross-examine.

[286] MR. RICHTER: No questions.

By THE COURT:

Q. Where did Mr. Neal come in?

A. He was the pilot on the trip leaving Toledo on the 10th.

Q. After that you didn't have him any more?

A. No, sir.

MR. PRICE: That is all, thank you.

MR. PRICE: Mr. Walters.

EDWIN B. WALTERS, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. PRICE:

Q. Mr. Walters, what is your occupation?

A. Trainmaster for the Reading Company.

Q. And have been for ~~how~~ many years?

A. Since about 1936.

Q. And how long have you been working for the Reading Company.

A. Since 1918.

Q. That is the company that runs the Reading Railroad?

A. Yes, sir.

Q. Do you know Mr. Rosser, who works for the Reading?

[287] A. Yes, sir.

Q. He is a subordinate of yours?

A. Yes, sir.

Q. You are his superior officer as trainmaster?

A. That is right.

Q. Are you familiar with rules 103 and 103a?

A. I am familiar with 103 of the Reading Company's book of rules. We don't have 103a.

Q. All right. 103 of the Reading book of rules,—you have also seen the Pennsylvania Railroad rule on that, No. 103?

A. Yes, sir.

Q. Does that rule, either for the Reading or the Pennsylvania, require a brakeman or other trainman to ride on the end of a light engine, that is, an engine without any cars, just the engine and tender, when a backward movement is being made?

A. No, sir; that is, the Reading Company doesn't. I don't know about the Pennsylvania Railroad whether that does or doesn't.

Q. But the Reading rule, 103, does not?

A. No, sir.

Q. Would it make any difference whether that engine was running against traffic or current with traffic, or not?

[288] A. No, sir, that wouldn't have any bearing on it.

Q. And the tender when it is attached to the engine and is part of the engine assembly for any particular movement, is that considered to be a car, such as a freight car would be?

A. No; we consider that as one unit.

Q. The engine and tender together as one unit?

A. Yes, sir.

Q. Mr. Rosser testified a day or two ago that when an engine was backing up, a light engine backing up, that the brakeman was required to ride on the stirrup of the engine or tank in order to take a conspicuous position, whether it was for one mile or ten—do you agree with that?

A. No.

Q. What do you have to say about a trainman riding for as much as ten miles, or considerably less, on the back end of a tank in winter weather?

A. I would say it would not be good railroad practice, and it would be hazardous; he would be placing himself in a hazardous position.

Q. You say there isn't any rule 103a on the Reading?

A. No, sir.

THE COURT: What is rule 103a that is not on the Reading?

MR. PRICE: That relates to shifting across [289] crossings.

By MR. PRICE:

Q. Do you have a rule similar to 103a of the Reading when a train is shifting over a public crossing not protected by a watchman?

A. Yes, sir.

Q. What is your corresponding rule number?

A. I don't remember exactly right now.

By THE COURT:

Q. What does it provide, that coresponding rule of yours, what does it provide?

THE WITNESS: It provides for protection of highway traffic at a public crossing when a train and crew are switching over the crossing.

THE COURT: In what way does it make provision for protecting the highway?

THE WITNESS: By instructing a member of the crew to protect the highway traffic over that crossing when they are switching over the crossing.

By MR. PRICE:

Q. With that rule in mind, and this rule 103a of the Pennsylvania in mind, it has been testified that a train was

stopped and cut, that the first car of the rear end of the train which was left behind blocking a crossing, or projecting [290] across a crossing, when the front end was pulled up a hill and the engine came back light to pick up the remaining half of the train to be pulled up,—the other part of the train was left on this country crossing which wasn't a commonly used highway, and that the engine came back and made a coupling, and pulled forward,—it didn't back backward, but just pulled up to the standing cars, would you say that your rule 103 or your coresponding rule applied to that?

A. No, sir; he wouldn't be switching over that crossing.

MR. PRICE: Cross-examine.

CROSS-EXAMINATION.

By MR. RICHTER:

Q. When were you notified to come to court, Mr. Walters?

A. I believe it was last Friday. I had been notified before, but it was postponed two or three times.

Q. Who notified you to come to court Friday?

A. My superintendent.

Q. The superintendent of the Reading Company?

A. That is right.

Q. Did you go in to see your superintendent personally?

A. No, sir.

Q. And you were sent by the superintendent at the request of the Pennsylvania Railroad?

A. I don't know who requested it.

[291] Q. Mr. Rosser is a man of vast experience in railroading?

A. I believe he has had quite a few years' experience.

Q. Not only on the Reading but with other companies?

A. I don't know about other companies.

Q. He is assistant trainmaster?

A. Yes, sir.

Q. Mr. Rosser came up to his position through the train crew, as brakeman, conductor, and so forth?

A. I believe he was conductor at one time.

Q. And you came up through fireman?

A. Yes, sir.

Q. Therefore, you didn't have a trainman's experience as a conductor, flagman, or brakeman?

A. I would say I did because I was a fireman, engineer, rules examiner, instructor, and trainmaster.

Q. You were never a brakeman?

A. No, sir.

Q. You were never a conductor?

A. No, sir.

Q. You were never a flagman?

A. Yes, sir.

Q. When were you a flagman?

A. A fireman's duties requires him to perform flagman service at certain times.

[292] Q. That rule is a rule that applies to a trainman, who has to take a conspicuous position——

A. To a trainman?

Q. That is a rule that the conductor hands down to his flagman, and he has to take a position at the end of the cars backing up so as to watch that the cars are coupled up?

A. I wouldn't say at all times, because it would be the responsibility of the engineman to know he had a man on the lead end of a draft of cars that was being pushed.

Q. He only looks for signals from whoever was placed there by the conductor, that is what interests him?

A. He knows he is there definitely; he knows he is there definitely, or he doesn't move.

Q. Coming down to rule 103,—you have rule 103?

A. Yes, sir.

Q. That is in every railroad book?

A. That is taken from the standard code, but the wording isn't the same.

Q. They just change the wording as conditions require?

A. I don't know——

Q. Those are the only words in your book that mean it is absolutely necessary to always have a man at the hind end?

A. When cars are pushed by an engine.

Q. You know the Noble Street crossing in the City of [293] Philadelphia?

A. No.

Q. You are trainmaster, and are aware of the type of crossing that you have where you cross 5th, 7th, 9th and 6th Streets, in the City of Philadelphia?

A. I have a faint idea, but my territory is out on the road more than the City of Philadelphia.

Q. You are not aware what the rules are in regard to public crossings?

A. Yes, sir, because we have the same conditions in towns outside of Philadelphia as in the City of Philadelphia.

Q. Let's take some little town that you know,—you know the crossing at Lansdale?

A. Yes, sir.

Q. You know the crossing at Main Street?

Q. Would you undertake to move on such a track, at Main Street, with an engine, backing cars across the street, without a flagman in advance of the movement to watch the crossing?

A. There are gates protecting that crossing, and a watchman provided for Main Street, Lansdale.

Q. Let us take the street above Lansdale,—what is that street where they don't have a——

[294] A. They all have a watchman.

Q. One of them doesn't have a watchman.

THE COURT: You can ask him what the purpose of a watchman is. The purpose of a watchman is to

do something—that is what we want to establish, the principle.

MR. RICHTER: That is right, Your Honor.

By MR. RICHTER:

Q. What does a watchman do?

A. He protects the highway traffic over the crossing.

Q. That is exactly what the man is supposed to do under rule 103, to watch the highway traffic?

A. No, sir.

Q. What is he there for?

A. If they are switching cars, he is there for the purpose of protecting highway traffic.

Q. That is the rule that corresponds to 103a?

A. Provided they are switching over that crossing.

Q. How about the rule that corresponds to 103? Don't you have a flagman where you are pushing an engine, car, tender, or caboose, make sure that the couplers are lined up, and that no persons are in and about the cars?

MR. PRICE: I must object to that. He asks four or five questions. I object to these compound questions.

THE COURT: Strike that out.

[295] MR. RICHTER: This is cross-examination, and this is your witness.

By MR. RICHTER:

Q. When you are backing with an engine, your coupler has got to be set properly?

A. Yes, sir.

Q. These are automatic couplers?

A. Yes, sir.

Q. But your draw bar has got to be in line or it will not couple right?

A. That is right.

Q. And who watches out for that?

A. Any member of the crew who is——

Q. Generally it is the brakeman?

A. Or the conductor.

Q. Or conductor? But some man has to be there——

A. To see that the knuckles are properly aligned.

By The Court:

Q. What are the duties of a trainmaster?

A. I have supervision of all members of the train crews in the territory where I am assigned.

Q. And where is your office?

A. Third and Erie Avenue.

Q. Your office is stationed there?

[296] A. Yes, sir,

Q. And you have charge over the division and dispatch the crews in that respective territory when the trains go out?

A. That is right.

Q. It is administrative?

A. Yes, sir.

Re-Direct Examination.

By Mr. Price:

Q. You are boss of all the train crews, conductors, firemen, enginemen, brakemen and flagmen that work in your territory?

A. Yes, sir.

Q. You were asked a moment ago about couplers being aligned properly. If they are lined up properly they will couple without any more being done?

A. Yes, sir.

Q. It is an automatic operation?

A. After they are properly set.

Q. If they are not properly set the coupling will not be made?

A. Yes, they are semi-automatic.

Q. If the coupler meets they will line up by themselves?

A. Yes, sir.

Mr. Price: That is all.

[297] RE-CROSS-EXAMINATION.

By MR. RICHTER:

Q. Even on places where there are no public crossings —let's take the Erie Avenue yard, where a car is backing up to other cars standing on the track, there is a flagman on behind who steps off if there are cars behind the engine.

You are not distinguishing between pushing a freight car and a coal tender?

A. That is right.

Q. The same kind of coupling would be involved in coupling between two freight cars and coupling between a tank and a freight car?

A. They are practically the same.

MR. RICHTER: Practically the same—that is all.

MR. PRICE: That is all, thank you.

THE COURT: Thank you, Mr. Walters.

MR. PRICE: Take the stand, Mr. Hirschmann.

HERMAN D. HIRSCHMANN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. PRICE:

Q. Mr. Hirschmann, you are employed by the Railroad Company [298] in what capacity?

A. Engineman.

Q. And have been for how many years?

A. Twenty-six.

THE COURT: What company?

THE WITNESS: The Pennsylvania Railroad.

By MR. PRICE:

Q. You were the engineman of this train, ED-4, I take it, on December 10, 1944?

A. December 10—yes, on December 10—yes, sir.

Q. And Mr. Neal was pilot?

A. That is right.

Q. You remember doubling Tiro Hill that day?

A. Yes, sir.

Q. That is an unusual occurrence?

A. I couldn't tell; I am not familiar with that territory.

Q. Did you ever do it before yourself?

A. No.

Q. And therefore had to have a pilot on board?

A. Yes, sir.

Q. And who was running the engine?

A. Mr. Neal.

Q. He was the pilot?

A. Yes, Mr. Neal.

[299] Q. When you have a pilot on board who has to run the engine when the regular engineman isn't qualified in that territory?

A. The pilot.

Q. Do you remember taking the first part of the train up to Vernon and leaving it there, and coming back with a light engine?

A. Yes, sir.

Q. When you came back with the light engine, what were you doing?

A. I was working with the fireman—helping the fireman.

Q. You were having trouble with the fire that day?

A. Yes, sir.

Q. And that was why you couldn't get that train over Tiro Hill?

A. That is why, on account of poor coal.

Q. Poor coal—if you got poor coal on the engine what would it do to the fire?

A. That causes the fire to clinker, and the fireman can't keep up steam.

Q. And does that require more work in firing?

A. Let's not go into that.

Q. You were working along on the fire with the regular fireman?

A. Yes, sir.

[300] By The Court:

Q. On what side of the engine?

A. I was in the middle, helping with the fire, helping the fireman and giving him a breathing spell on the fire.

Q. It took a lot of stoking up that grade. Where is your station customarily?

A. When they have a pilot?

Q. When you are at work, you are the engineman?

A. Yes, if I am in charge, but when a pilot is on he takes charge.

Q. You are what they call the engine spare?

A. Yes, sir.

Q. You used the word engineman——

A. Engineman or engineer.

Q. That is synonymous, I understand. And you were the fireman?

A. I was helping the fireman.

Q. And the pilot was taking over because he was on familiar ground?

A. Yes, sir.

The Court: All right, now, we got it.

By Mr. Price:

Q. When you were coming back, did you pay any attention to the operation of the engine?

[301] A. No.

Q. Were you in a position where you could see out of either side?

A. I just glanced out of the gangway while I was working with the hook in the fire to see where I could throw the clinkers out.

Q. You were looking down the track?

A. No.

Q. Were you in a position to look down the track?

A. I didn't even look. I didn't know the territory I was on.

Q. I just want to know where you were on the engine?

A. I was in the gangway, in the middle, working the fire, and when I drew a clinker out I would throw it over on the side—which we have a right to do.

Q. Do you remember anything about the coupling that was made when you coupled to the other cars?

A. I was standing right in the middle of the deck. The pilot was going very slow, and I was standing there, and I figured we might be close to the cars, and I was waiting for them to stop, or whatever was going on, and when he stopped I said to him, "Did you make it?" just like that—I didn't feel any jar of any kind, and then I proceeded pulling more clinkers.

[302] Q. Would you say anybody on the engine was jostled, or anything?

A. I know I wasn't. I was standing right in the middle with the hook, and if it had hit hard I would have went one way or the other, off balance.

Q. Was there any damage to the equipment?

A. No.

THE COURT: Do you mind if I ask a question? I didn't understand that Mr. Callen claimed that he was jostled off this stirrup on the engine. I understood he became frightened at the engine not slowing up, and he jumped before the coupling was made. I don't know that he said anything about what speed it was going when the coupling actually was made. Now, is that right?

MR. PRICE: No, I think he said it was going six miles an hour and that it hit the standing cars quite a clip. He said it hit a hard bump—I forget his exact words.

THE COURT: And he jumped off?

MR. PRICE: He jumped, that is right.

THE COURT: Several car lengths before, that is my recollection.

MR. PRICE: No, it was within a few feet.

THE COURT: The reason I ask is that Mr. [303] Hirschmann is telling us about the actual coupling operation, and he says that there was no jar. I was wondering if we were correct in our belief in the theory of the plaintiff that he didn't stay on the stirrup until it struck because the speed at which he was going would have thrown him under the wheels, and he jumped to save himself from what he thought was immensely high speed.

MR. PRICE: That is what he said, that is what he said.

MR. RICHTER: That's right.

MR. PRICE: That is what he said, it was going six miles an hour, and that is why I was asking this witness how fast the train really was going.

THE COURT: And he didn't feel any jolt.

MR. PRICE: That is relevant, because a coupling made at six miles an hour, as Mr. Rosser said, would damage the equipment. I am asking whether there was any damage to the equipment, and obviously there would be a jolt going at six miles an hour. That is the purpose of it.

THE COURT: Very good. Thank you.

By MR. PRICE:

Q. Now, Mr. Hirschmann, after the coupling was made, did you still continue working with the fire?

A. I certainly did.

[304] Q. After you started up, or tried to start, did you see Mr. Callen at any time?

A. No, I couldn't see, or I didn't, because I wasn't looking out.

Q. Now, after you got back up the hill, after you had made your coupling up there, did you see Mr. Callen back at Vernon?

A. I didn't, because I wasn't looking out. I was still working with the fireman helping the fireman out.

Q. After you got to Vernon and stopped, and you coupled up the train, you went on to the next place?

A. Yes, we pulled the hind end as far as the switch, and cut off there to the hind end again.

Q. While you did all these things did you see Mr. Callen?

A. I couldn't see.

MR. PRICE: All right. Cross-examine.

CROSS-EXAMINATION.

By MR. RICHTER:

Q. As you were looking out of the cab of the engine as the engine was going backward, could you see anything, or did the train block your view?

A. I wasn't looking out to see anything.

Q. Do you remember testifying in Pittsburgh in this case?

A. I do.

[305] Remember you were asked this question, "Were you looking backward as the engine was going backward?" And your answer was, "I couldn't see anything on account of the tank." Did you say that?

A. I couldn't; if I turned around in the middle of the cab in the big engine. You will see in my statement I can't look back and see anything on account of the tank,—no.

Q. The tank blocks your view?

A. I would have to get out in the middle of the gangway and hang out the side, or look out the side to see back.

Q. How far out of the side do you have to hang?

A. Not very far.

Q. You actually have to stick your head out——

A. You have to look out, sure.

MR. RICHTER: That is all.

RE-DIRECT EXAMINATION.

By MR. PRICE:

Q. You have to stick your head out to see either front or back?

A. Either way on the "J".

Q. If you are inside the line of the cab or any projection of the engine, you couldn't see either backward or forward?

A. That is right.

Q. Where is the engineman's seat on this engine?

[306] A. On the right-hand side.

Q. How close to the side window is it?

A. You are right alongside of it.

Q. Right alongside of the window?

A. Yes, sir.

Q. And you can stick your head out and look forward or backward.

A. That is right, yes, sir.

Q. On the rear end is there any partition where the engineman sits?

A. You mean in back of the engineer?

Q. Across the back.

A. The seat is like this (indicating), this would be the seat, and boards run the width of the seat back there.

Q. Just about the width of the seat?

A. Yes, sir.

Q. And when you sit on the seat looking back you have to stick your head out?

A. Yes, certainly.

Q. You can't see out of the partition?

A. No.

Q. Is there a partition in there?

A. The way the new engines are——

Q. No, this engine.

[307] A. This engine, particularly, the window is very small, and the least little dirt or rain would blow right through and dirty your window, and you would have to look out on the side.

By The Court:

Q. You wear goggles when you do that?

A. Yes, sir.

By Mr. Price:

Q. What is the usual position, with the head inside or outside?

A. Always outside.

Q. Outside, leaning out to the side?

A. You always get a better view out.

Mr. Price: That is all.

Re-Cross-Examination.

By Mr. Richter:

Q. The window in front is for you to look straight ahead when you are going forward, you are supposed to be able to sit in your seat, and look out the front window without sticking your head out?

A. You are supposed to, but you can't.

By The Court:

Q. What do the rules say?

A. Well, now here, if you have to get up every minute and [308] wipe off that window with waste, you aren't going to be able to see everything that is going on. We have a windshield on the side of the cab, and when we lean out that windshield helps to protect our face.

Q. From the cinders?

A. You get a lot down your neck, anyhow.

By Mr. Richter:

Q. When you are looking out the window, you might bang your head with close clearance?

A. No, not if you are looking.

Q. No?

A. Not if you are looking.

MR. RICHTER: O. K.

MR. PRICE: That is all.

MR. PRICE: Mr. Patterson.

WILLIAM H. PATTERSON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. PRICE:

Q. Mr. Patterson, what are your connections with the railroad, in what capacity?

A. Fireman on the Pennsylvania Railroad.

[309] Q. And have been for how many years?

A. Four years now.

Q. Four?

A. Yes.

Q. Were you the fireman on this train when it doubled over Tiro Hill back in December, 1944?

A. I was.

Q. You are the Mr. Patterson that has been referred to in the crew list and so on?

A. Yes, sir.

Q. Do you remember anything about the operation when you came back and coupled up to the standing draft of cars?

A. There was nothing out of the way; there was no jolt or anything.

Q. Nothing unusual?

A. Nothing.

Q. Any damage to the equipment?

A. No.

Q. When you made that coupling, do you remember where you were, were you standing or sitting?

A. I was seated on the left-hand side of the engine, looking at the rear.

Q. Did you feel any unusual motion when you coupled up?

A. No.

[310] Q. Did you see Mr. Callen at or about that time?

A. I didn't see Mr. Callen.

Q. When did you first see him after you made the coupling?

A. I didn't see Mr. Callen until we took water at Mansfield.

Q. At Mansfield?

A. Yes, sir.

Q. Did you talk with him?

A. No, I just turned the plug around so that Mr. Callen could take water; the brakeman generally takes the water, and all the fireman does is to turn the plug around.

Q. He was with you at that time?

A. He was on top of the tank.

Q. Either at that time or any time on this trip did he say anything about being hurt?

A. He didn't say anything about an accident or being hurt in any way.

Q. Did he make any complaint to you about the way the engineer operated the engine?

A. No, sir.

Q. Did you know about the supposed accident he had at the time?

A. No, sir, I did not.

MR. PRICE: Cross-examine.

[311] CROSS-EXAMINATION.

By MR. RICHTER:

Q. You had not seen Callen from the day you saw him on that trip until you saw him in court?

A. No.

Q. You didn't see him any more that year?

A. Yes.——

Q. In order to talk to him?

A. No, I didn't talk to him.

Q. Therefore, that is the reason he didn't say anything to you?

A. That is right.

Q. Where is Mr. Callen supposed to stand as this coupling is being made,—betwen the coupled cars?

A. Sir?

Q. Where is Mr. Callen supposed to stand as the tank was coming back to make the coupling with the cars?

A. Well, his usual place is in the dog house.

Q. Isn't he supposed to be on the ground?

A. No, sir.

Q. Somebody is supposed to be there to make the coupling?

A. Not until after the coupling is made.

Q. Do you remember testifying in Pittsburgh, under oath?

A. Yes, sir.

[312] Q. And you were asked this question, Mr. Patterson——

THE COURT: Not too fast.

MR. RICHTER: I will go very slow.

"Q. Do you know who made the coupling?

A. I don't know that.

Q. Is somebody supposed to be there to make the coupling?

A. There was somebody supposed to be there to make the coupling.

Q. Where are they supposed to be when you make the coupling?

A. On the inside.

Q. Does he stand on the ground?

A. He has to get on the fireman's side, he is supposed to be on the ground.

Q. Pardon me?

A. He is supposed to be on the ground.

Q. Where the coupling is being made?

A. That is right.

Q. And watch it being made?

A. Yes.

Q. Make sure that the jack drops properly?

A. Yes.

Q. Then he goes in and connects up the air hose, is that correct?

[313] A. That is correct.

Q. Whose job would that be under these circumstances if the head brakeman was on your engine up in the shelter box, to make that coupling?

A. It would still be his responsibility.

Q. It would be his job, wouldn't it?

A. That is right."

You testified to all that?

A. It would be his job to connect up the air hose.

Q. And make sure that the jack dropped and everything else in there, isn't that so?

A. Yes, sir.

Q. Of course, it is. That is all.

RE-DIRECT EXAMINATION.

MR. PRICE: This is what I am going to show the jury, what Mr. Richter failed to read to the witness——

MR. RICHTER: You asked a lot of leading questions—if you are trying to cross-examine your own witness——

MR. PRICE: I move for withdrawal of a juror. The comment that Mr. Richter made that I was trying to cross-examine this witness——

THE COURT: Mr. Richter read something there to the jury, and you said Mr. Richter failed to read all of

[314] it, and he said something just at that time, I didn't catch what he said.

MR. PRICE: He said that the questions that were asked were leading——

THE COURT: Note the objection.

MR. PRICE: And will Your Honor caution the jury to disregard that kind of side remarks by counsel?

THE COURT: I want to couch my instructions to the jury properly. Did Mr. Richter mean to say that when the testimony was taken there were certain questions that he considered to be leading that he objected to?

MR. PRICE: No, he didn't——

MR. RICHTER: That followed after Mr. Pringle started to ask a line of leading questions on cross-examination and——

THE COURT: All right, we can disregard that, and we will take the written record as it stands. Let him read the whole thing so that the jury will get the whole picture.

MR. PRICE: Yes, sir.

"Q. You are a fireman?

A. That is right.

Q. And you have just had three years experience?

A. That is right.

[315] Q. You don't know whether any man has to be on the ground or not at the time a coupling is made?

A. I have never been instructed as to whether he has to be on the ground or where he had to be.

Q. Wasn't this an automatic coupling that was made?

A. It was.

Q. Nothing to be done by any man in making the coupling, it coupled automatically, didn't it, on impact?

A. That is right.

Q. You say the coupling was made on the first impact in this case?

A. That is right.

Q. You did not have to back up and try it again?

A. No.

Q. Then when you answered counsel about a steady signal from a brakeman, were you thinking about a coupling between two cars rather than a coupling between an engine and a train?

A. That's true enough.

Q. If you know, is there a difference between the procedure in coupling between two freight cars and coupling between the tank of an engine and a string of cars?

A. There is. The engineer can see between the tank of [316] the car, just about the distance of it, where on cars he positively can't see past.

Q. If there is a string of cars in back of the engine, between him and the car that is being coupled, then you have a different situation?

A. That is right. He couldn't see that at all.

Q. You have never been instructed as to what the duties of an engineer are in connection with making a coupling between his engine and a train of standing cars?

A. No.

RE-DIRECT EXAMINATION.

By MR. RICHTER:

Q. You know of course that before cars can be coupled one must be certain that the jaws are also operating?

A. That is true

Q. That the drawbar is properly aligned, you know that?

A. Yes.

Q. You can't make a coupling unless the jaws are properly opened or a drawbar is properly aligned?

A. That is right.

Q. Otherwise you would do some damage?

A. That is right.

Q. Is that why you have to be sure somebody is out there?

MR. PRINGLE: Objected to because it is not proper re-direct examination.

[317] Q. Go on and answer. Is that the reason that someone has to be out there to watch the coupling to make sure that the jaws are open and properly aligned?

MR. PRINGLE: Objected to as incompetent, irrelevant, and immaterial.

MR. RICHTER: Now go on and answer.

MR. PRINGLE: And as calling for an opinion.

THE WITNESS: They are supposed to be open so somebody has to open them eventually."

You testified that way at that time?

A. That is right.

Q. And Mr. Richter was present at that time and heard those answers?

A. Yes, sir.

THE COURT: That was the only question brought up on rebuttal, that is, the air hose that controls the air?

MR. PRICE: He wasn't talking about that.

THE COURT: That is automatic also?

MR. PRICE: No, that has to be done by hand.

THE COURT: That is a part of the whole operation, the coupling,—are there old Gould couplings on these cars?

MR. PRICE: I am not sure. I wouldn't say for certain.

[318] THE COURT: Most of us know that operation. We have watched coupling around cars and freight stations, and connecting up the hose that controls the air, that is a different situation.

MR. PRICE: That has to be done by hand, but the knuckle couples up automatically.

THE COURT: You have got that whole record in?

MR. RICHTER: I would like to finish it; I think it is corroborative of our position.

RE-CROSS-EXAMINATION.

By MR. RICHTER:

Q. You were asked this question——

MR. PRICE: I object to this, and ask Your Honor to rule on this before this is read——

MR. RICHTER: I will be glad to show it to Your Honor. It is right on the point in question.

THE COURT: Mr. Price, would you like to discuss that? I mean if——

MR. PRICE: There is nothing contrary there.

THE COURT: If you want the jury excused—I feel inclined to think that it is probably proper, but you may have an objection that I don't think of.

MR. PRICE: My objection is,—I can state it in one word—there is no contradiction, and you can't [319] read a deposition into the record in that way.

THE COURT: With that understanding, I will admit it, and leave both of you to discuss its relevancy later on. There is a feature that I have in mind that might make it relevant. Mr. Richter might have a different purpose in offering it.

MR. PRICE: Your Honor will note my objection?

THE COURT: All right.

By MR. RICHTER:

Q. You were asked this question:

"Q. His job would be to get off the engine where you approach the point where the coupling is to be made so as to make the coupling?

MR. PRINGLE: If you know.

THE WITNESS: Say it again.

Q. His job would be to get off to the ground as the engine approached the point where the coupling is to be made?

A. Either that or give the engineer the steady sign to get back in and then get back off the car.

Q. What do you mean?

A. He has to stick his hand out.

Q. Indicating with his right hand extended. Then the engineer would follow you?

[320] A. That is right.

Q. By slowing the train down to a slow even impact?

A. That is right."

That is correct, isn't it?

A. That is right.

Q. He has to be in a position where he can be seen or else he can't give the hand signals?

A. Not for an automatic coupling operation.

Q. You know when you gave this testimony—we were talking about this case?

A. That happened in 1944, did it not?

Q. Yes.

A. And one year later I was called in for investigation, and I was to remember everything that happened?

Q. Just to tell all you know honestly. You knew we were asking about the accident in which Mr. Callen was injured?

A. That is right.

Q. And you knew it was just an engine and tank moving backward?

A. Just that unit.

Q. An engine and tank moving backward, you knew that?

A. Yes, sir.

Q. And you knew there were no cars coupled onto the engine [321] moving backward?

A. That is right.

Q. And notwithstanding that you knew these facts you testified as you did on direct examination?

A. I did.

Q. You knew I was talking about the accident in which Mr. Callen was injured?

A. That is right.

Q. And therefore you are referring in your testimony to that circumstance and not something else that might have occurred somewhere else under different circumstances?

A. What was that again?

Q. You knew that I was asking you and I was trying to get information how this accident happened?

A. That is right.

Q. And you were not referring to any other situation or any other circumstances, were you?

A. I was not.

MR. RICHTER: That is all.

RE-DIRECT EXAMINATION.

By MR. PRICE:

Q. You were asked what it would be, not what it was, in connection with this.

I will ask you what you meant when you answered [322] the other question when you were asked about the "steady" signal, you were talking about the ordinary situation coupling cars with other cars?

A. That is right.

RE-CROSS-EXAMINATION.

By MR. RICHTER:

Q. Even though, it would still be his responsibility, Mr. Callen's, to——

A. To couple the air hose.

Q. That is what you were referring to,—you were not talking about getting on the ground and setting the pin drop?

A. No.

Q. But he had to see that it dropped perfectly?

A. No, he doesn't control the pin.

By THE COURT:

Q. When there is an uncoupling in the middle or at some place along the line, not from the tender, does the air hose have to be connected under those circumstances?

A. If you are moving on the main line you have to have the air hose. You have to have air on the train, but in the yard it is unnecessary.

Q. Take where you are moving and couple together and jostle, with a lot of noise all along the line of the train when they couple together in a coupling operation, then when these [323] cars are joined together, then is there air control between all these cars in every circumstance?

A. Yes, there is the air hose.

Q. On all of them?

A. Yes, sir.

Q. Whether that coupling is between the train and the tender or locomotive, as we call it, or between the two cars in the train, the air hose has to be coupled up?

A. Yes, sir.

Q. After every coupling operation there has to be an air hose connection?

A. Yes, sir.

THE COURT: All right, I think we understand. Thank you.

[324] MR. PRICE: Mr. Almond.

JAMES A. ALMOND having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. PRICE:

Q. Mr. Almond, how long have you been working for the Pennsylvania Railroad?

A. About 21 years.

Q. I can't hear you.

A. About 21 years.

Q. In what capacity?

A. Conductor, flagman, and brakeman.

Q. On this freight, on December 10, 1944, when you had to double Tiro Hill, what was your job?

A. Flagman.

Q. What does flagman consist of on that train?

A. On the rear end of his train.

Q. What does the flagman do?

A. When the train stops you are supposed to go back and protect the equipment,—get out and protect the train.

Q. You walked out from behind the rear end?

A. Yes, sir.

Q. When your train stopped on this occasion, did you go up [325] to where it coupled at all?

A. No, sir.

Q. You remained on the rear?

A. Yes, sir.

Q. Did you stay there during all the time that they took the first half of the train up to Vernon and back again?

A. Yes, sir.

Q. How did you know when they coupled the engine to the remaining cars?

A. I didn't know.

Q. How did you get the signal to come in to your train?

A. By the whistle of the engineman, who called me in.

Q. What does he do?

A. It depends on which way he is going.

Q. Suppose he is going forward?
A. He will whistle,—five whistles.
Q. And then you come in?
A. Come in and stay in the cabin at the end of the cars.
Q. The cabin is the caboose?
A. Yes, sir, that is right.
Q. That is on the rear end of the train?
A. Yes, sir.
Q. And that is what you did in this case?
A. I came to the end and I stayed there.
[326] Q. You said you didn't know the coupling had been made?
A. No.
Q. And you got in the cabin and rode to——
A. I didn't go in the cabin until he whistled off.
Q. What does he do to whistle off?
A. Two long.
Q. Does that mean he is going to start?
A. That means he is ready to start,
Q. He whistled off, and you got in the cabin?
A. I sit on the side.
Q. You got in sometime before?
A. Oh, yes.
Q. Did you ride up to Vernon in the cabin?
A. I did.
Q. When you got to Vernon, did you see Callen?
A. No.
Q. Did you see him at all that day?
A. No, sir—I saw him when we left Toledo.
Q. When?
A. When we left Toledo.
Q. I mean after doubling the hill?
A. Oh, no.
Q. When was the next time you saw him?
A. The second trip afterward.
[327] Q. Do you remember what day?

A. We generally run on even days, 8th, 10th, 14th, 16th, and 18th.

Q. Were you on the run from the 12th to the 14th?

A. Yes, sir.

Q. Was Callen there?

A. No.

Q. What kind of a day was that?

A. It was snowing in Conway.

Q. What makes you think it was snowing?

A. Because I was flagging, and I had to get off, and I stayed in the caboose that night; I came from Pittsburgh that night.

Q. Did you get home?

A. I came from Pittsburgh because I knew my run was going to get held up——

Q. Where did you stay that night?

A. In the cabin. I got bedclothes and all in there.

Q. You didn't see him on the 12th and 14th, and the next one was the 16th and 18th,—did you see him then?

A. Yes, sir.

Q. What, if anything, did he say, or did you hear him say, about why he had not been there on the 12th and 14th?

A. In the morning, when we got the bills,—I left Conway——

[328] Q. What is bills?

A. The car waybills.

THE COURT: The waybills.

MR. PRICE: The waybills, I got it. Go on.

THE WITNESS: We had gone to Toledo all the way, and I never seen him all the way out except by Millbrook. I was back flagging the train, and I was looking across there. When we got to Toledo and pulled in and put the air on, we stopped there. Of course, he cut the engine off, as he was supposed to do, and take the engine and come back to the rear of the train. In the meantime I got my supper. He came back in the cabin, and

had his bag and lantern, that he put in the locker. We were talking, and he said he was digging snow,—shoveling snow. I continued getting my supper, and after that he and Mr. Crum got into conversation.

By Mr. Price:

Q. What did Mr. Callen say to Mr. Crum?

A. I don't know. I was busy with my other things, and I didn't pay too much attention.

Q. When was it he said he had been shoveling snow?

A. When he came back from the head end to the cabin.

Q. When did he say he had been shoveling snow?

A. He said he had to shovel snow so he could get out.

Q. When was he supposed to do the shoveling in the snow?

[329] A. Sir?

Q. At what time was he supposed to do the shoveling in the snow?

A. He said he shoveled snow for two days; where he shoveled, I don't know, I don't know.

Q. Did he complain to you at that time, or any other time, about having hurt his back?

A. No complaint to me at no time.

Q. Did he say anything about having hurt his back on the 10th?

A. No.

Q. Or on the 14th or any other day?

A. No, sir.

Q. Were you on the run on the 20th and 22nd?

A. No, sir, I laid off.

Q. So that the last time you saw him was on the 16th?

A. That is right.

Q. Are you a brakeman, too, a qualified brakeman?

A. Yes, sir.

Q. Are you familiar with the operation that was described about the engine coming back with a man up in the dog house, I think it is called, as the engine was backing

up, to make a coupling, and there is a man in the dog house, can you tell us whether it would be proper for him to come out before [330] the engine stopped?

A. Well, I wouldn't come out.

Q. What was the proper operating practice?

A. For him to stay there until the engine stops.

THE COURT: To do what?

THE WITNESS: To stay in there until the engine stops. Whether he couples against the cars or anything else.

MR. PRICE: Cross-examine.

CROSS-EXAMINATION.

By MR. RICHTER:

Q. Where did you say you were when this coupling was made, back in the caboose?

A. No.

By THE COURT:

Q. How old are you?

A. 49.

Q. 49?

A. Yes.

By MR. RICHTER:

Q. You are still with the company?

A. Yes.

MR. RICHTER: That is all.

MR. PRICE: That is all.

THE COURT: One minute.

[331] By THE COURT:

Q. You spoke about not having seen the coupling operation. I understood you to say you were stationed down at the caboose?

A. That is right, at the rear of the cut.

Q. And where is he stationed?

A. He is on the head end.

Q. On the head?

A. Yes, sir.

Q. The train had 80 cars on it—how long do you calculate the 80 cars are?

A. Eighty cars, very near three-quarter a mile; 135 cars to a mile.

Q. He isn't quite near anybody?

A. No.

Q. When you had this talk about the snow, how did that come up, what brought up that discussion?

A. We had an awful deep snow in Conway on the 12th to 14th, because they were calling up all the firemen they could get to come in for switching engines and helping in the yard.

Q. You live at Conway?

A. I room at Conway.

Q. Does Mr. Callen live at Conway?

A. No, he lives out in the country some place.

Q. How did you come to discuss about the snow?

[332] A. Well, Mr. Callen and I, we were talking—he comes back in the cabin and eats with us quite often—he used to bring stuff out, and put it in the cupboard and we would all eat together. I don't know whether he had a car or why he shoveled the snow—he had some means of coming to Conway because there was no bus running at that time.

Q. He didn't tell you where it was?

A. No.

Q. Where is your home?

A. My regular home?

Q. Yes.

A. My home is in Virginia.

Q. I knew you talk like some of my neighbors when I was a boy.

A. I am from Stanton.

Q. And you lived in the North long——

A. Ever since I have been on the railroad, going on 21 years now.

Q. Did he make any complaint about pain in his back by reason of shoveling snow?

A. No, he never said anything about pain at no time. The only time he spoke to me, I was in Pittsburgh one day and he was sitting in a passenger train, and I asked how he was feeling, and he said "Not so good." He asked what become [333] of the lantern back in the cabin car, and I said I didn't know, it was left in the car. I haven't seen it since.

Q. Was he heavier than he is now?

A. Yes, sir.

Q. He gave his age as 36, and he said he weighed 210, I think——

A. I was a little heavier than I am now, too.

Q. Railroading isn't the easiest job in the world?

A. No, it is quite a lot of walking; it is nervous—you are on nerves all the time.

Q. Nothing was said about where the snow was shoveled?

A. No.

Q. Did he tell you when he was shoveling snow?

A. Yes, the two days he was off, the 12th and 14th, because he worked on the 16th and 18th.

By Mr. Richter:

Q. The only time you saw Mr. Callen between the 10th of December and the following May was for these couple minutes in the caboose car?

A. No, I seen him on the 16th and 18th—he made that trip.

Q. He made the trip with you?

A. On the 16th and 18th.

Q. He didn't talk about his back on the 18th?

A. Oh, he made the whole trip with us—he went out and [334] came back with us.

Q. There was only one conversation in which he mentioned snow?

A. That is right.

Q. The rest of the time you heard nothing about shoveling snow?

A. That is all he said that one time.

Q. And when you asked him how he felt, where was it you spoke to him?

A. In a car in Pittsburgh; he came from the Rochester train, and I walked over and asked how he was.

Q. Asked how his back was?

A. No; I didn't know nothing about his back.

Q. You didn't know that he was hurt?

A. I didn't.

Q. You asked how he was generally speaking?

A. Yes, sir.

Q. Did he tell you he hurt his back?

A. He said he was not feeling so hot.

Q. Did you ask him what was wrong?

A. Yes——

Q. You had a lot of snow that winter?

A. Yes, sir.

Q. It snowed some thirty-seven nights?

A. I know one trip to Toledo it took 47 hours going there.

[335] Q. You remember this one particular snow?

A. I remember quite a few snows.

Q. The first time you were asked any questions about this accident was when?

A. When I was in Pittsburgh, I think, in July.

Q. The time I examined you in Pittsburgh?

A. Yes, sir.

Q. That is the time that the claim agent had all of you in for statements?

A. No—he talked——

Q. He talked to you?

A. No.

Q. He didn't ask you any questions?

A. Not him.

Q. You mean that the claim agent brought you in to his office and didn't interview any of you about the accident?

A. He didn't.

Q. He just called you in?

A. That is right.

By The Court:

Q. Did you make any written report at that time?

A. No.

By Mr. Richter:

Q. Have you ever made one?

[336] A. The statement he took in Pittsburgh.

Q. When did you give him a statement, before or after I examined you?

A. Afterward.

Q. Just to the claim agent—did anyone from the company ask you anything about this accident?

A. No.

Q. Did the trainmaster ask you anything about this accident?

A. No.

Mr. Richter: O. K. That is all.

Mr. Price: Mr. Veidt.

R. E. VEIDT, having been duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Price:

Q. You are claim agent for the Railroad Company?

A. District claim agent.

Q. And have been for many years?

A. District claim agent about five years; I have been in the claim department 15 years.

Q. This time that Mr. Richter was talking about, when some witnesses in Pittsburgh were examined, who did you

produce, [337] and why did you pick those particular people?

A. Well, we produced the same train crew we have here today, upon request of Mr. Richter.

Q. He gave you the names of the people and you produced them?

A. He didn't give the names to me; our solicitor at Pittsburgh arranged for it.

Q. But the request came from Mr. Richter in the first instance?

A. That is right.

Q. And whoever that was, you produced?

A. That is right.

Q. And he examined——

A. He examined them before I made my investigation.

Q. After they gave the testimony to him, then you took statements from them all?

A. That is right.

Q. And you were the claim agent that settled this case with Mr. Callen back in February, 1945?

A. I am.

Q. I show you these two exhibits, Plaintiff's Exhibits 2 and 3, one is the release, and the other the check, signed and issued on this date?

A. That is correct.

Q. Now, tell us the circumstances attending the payment of [338] that money and the taking of the release. How you happened to see Mr. Callen at all, and what happened when you did see him.

A. Well, of course, I work on the Toledo Division, and Mr. Callen was an Eastern Division man——

Q. Eastern Division?

A. He is an Eastern Division man, and I am district claim agent on the Toledo Division, and so I wasn't acquainted with him.

The first knowledge whatsoever I had concerning his accident is when I received a letter from him dated February 2, 1945. He mentioned in his letter that he had had

an accident, and suggested that he would like to discuss it with me, and suggested we might be able to work out a settlement; that he had not worked for a couple months, and he needed some money.

Q. You never heard anything about this accident until that time?

A. No, his letter was the first knowledge I had of the accident. There was no report to the company whatsoever about that.

Q. This place of the accident, was that in your district?

A. That is right, it was.

Q. The place where the accident happened was in the district, [339] but he lived in someone else's district?

A. That is right.

Q. What is the practice in regard to which claim agent handles a particular matter, is that dependent on where the man lives?

A. Where the accident happened—the place of the accident governs what claim department will handle the case.

Q. I see, all right. You said you got this letter and made an appointment to meet Mr. Callen?

A. He offered to come to Toledo and discuss it with me, and if it would be satisfactory. I replied to him and suggested that he come over, suggesting a certain date, and I agreed to be in the office to meet him. He came over on February 14, 1945.

Q. Did you ask him to bring anything with him when he came over to you?

A. When I replied to his letter, I enclosed one of our medical report blanks and suggested that he have his doctor fill it out and bring it along so that I would have some idea what was wrong with him, so we could discuss settlement.

Q. You sent him a blank form for him to get filled out?

A. That is right.

Q. I show you a paper marked Defendant's Exhibit 3 and ask you if this is the blank you are talking about?

[340] A. That is the blank, yes.

Q. When he came to see you he handed you that form?

A. That is right, filled out by Dr. C. S. Fair, New Brighton, Pennsylvania.

Q. When he gave you that, tell us what happened?

A. Well, he didn't arrive in my office until sometime around 9.30 in the morning. He told me he would like to catch train 126 back home that same afternoon—the train left sometime around 1:00 o'clock, or between 1:00 and 2:00 o'clock. That meant I had to make my investigation, discuss the case with him, and refer to the trainmaster for his investigation.

Q. Did the trainmaster have to see him also?

A. I promised the trainmaster I would send him in for investigation, because he had no knowledge of the accident in the two months that had elapsed.

Q. Go ahead and tell us what happened.

A. Knowing that he wanted to get out early in the afternoon, working on short time, the first thing I did was to call the X-ray doctors and arrange for an examination. I got an appointment, I think, at 10:30——

Q. Do you know whether he had an X-ray taken before that?

A. I know we had not, and his own doctor's report shows there was no X-ray taken.

Q. But, did you know that before he came?

[341] A. Oh, no, I didn't know that before he came—I didn't know anything.

Q. Did you make the appointment before he came that afternoon?

A. After he came to my office I called the doctor's office and made the appointment.

Q. Did you take him there for the X-ray before you talked about his case or settlement?

A. I started to type up his statement that is here on record, and I got part way——

Q. That is referring to Plaintiff's Exhibit 1?

A. That is right.

We started on that, and when we got partly finished we had to suspend while I took him over to the doctor's office for his X-ray examination.

Q. Did you see the doctor?

A. The doctor wasn't there—they are not there in the morning.

Q. Who took the X-ray?

A. The girl technician.

Q. Did you talk to her about the X-ray?

A. Only to make the appointment.

Q. Afterward did you talk to her about what the X-ray showed?

A. No, I waited in the waiting room in the doctor's office, and they took Mr. Callen into the X-ray, and when he came [342] back we immediately left and I had no conversation with the technician or any doctor.

Q. When did you first get the report about the result of the X-ray, what it showed?

A. I got the report some two or four days later by mail.

Q. From the doctor who took it?

A. From the doctor who made the reading.

Q. You went back to your office with Mr. Callen from the X-ray doctors?

A. That is right. We left the doctor's office and went back to my office and finished the statement of the facts.

Q. All right. Then what happened?

A. Then I took the statement, and he read it over and signed it, and then we discussed the matter of settlement.

Q. Tell us something what happened after your discussion?

A. Mr. Callen suggested that he should have his full lost wages and his expenses. I criticized him for expecting the company to pay him his wages for every day he was off, and all expenses, laying around home for two months and failing to get in touch with anybody on the railroad and let anybody know what was going on.

I told him, based on the facts of the case as he had given them to me in his signed statement, it was simply an accidental injury. He stepped down from the stirrup of [343] the engine moving at a walking pace in broad daylight—something a brakeman does any day, and I didn't see where the company was negligent in causing the accident, and I didn't see where there was any liability. I told him I couldn't pay the full lost wages and expenses. Finally I agreed to compromise, and pay him $250.00.

By THE COURT:

Q. You had not heard from the medical examination yet?

A. I had not heard from any medical examination in Toledo.

By MR. PRICE:

Q. What did he say to you?

A. He wasn't satisfied. He told me about his having been off two months and bills coming in, and he wasn't earning anything, and he thought he ought to have his full lost wages. I told him that the case didn't merit it and I couldn't justify it on the facts.

Q. Then what happened?

A. He started to walk out——

Q. Did you walk out with him?

A. He held out, as I remember, for $500.00. I refused to pay that, and so he started to leave the office, and I started right out behind him, because it was lunchtime and I was going to lunch. He stopped me in the hall and said to me, "If you can give me that $250 right now, I will settle." [344] I said I can do that, and so he turned around and went back into the office, and I typed up the draft and the release, and I took him down to the freight agent's office, and I think Mr. Callen signed the draft, and the release, and I had it witnessed by the clerk, and I witnessed it. Then we left, and I took him to the trainmaster's office for his investigation, and that's the last I saw him.

Q. He testified the other day, or last week, I believe it was, I can't remember the exact words, but you were supposed to have said to him that he had a terrible nerve or terrible crust to come in and ask for a settlement when there was nothing the matter with his back, indicating that you had seen the report of the X-ray and knew there was nothing wrong with his back.

A. He said I had a lot of gall to come in and ask for wages when there was nothing wrong with him,—I didn't say anything like that. I just criticised him for expecting to be paid his full lost wages and expenses, and at the same time living right over there where we have all kinds of railroad officials, doctors and relief doctors, and he had not kept in touch with anybody or let anybody know what was going on,—that is why I criticised him. I knew nothing about the results of the X-ray then. The only thing I had about Callen was his own report from his own doctor, that he brought with [345] him.

Q. And that is all you knew about his condition?

A. That is right.

Q. Did you undertake to tell him about his condition, or diagnose his condition, or tell him whether he was sick or well, or what his condition was?

A. No, I did not.

Q. Then, you took him to the trainmaster's office, and that is the last you saw of him?

A. That is right.

Q. Mr. Veidt, Mr. Callen also said something about your having told him that he would have to go to Chicago to settle his case; did you tell him anything like that?

A. No, I did not. That is a case strictly under my jurisdiction, and it would be entirely out of order to send a man to Chicago when it is my own case to handle.

Q. If you had sent him to Chicago would anybody in Chicago see him?

A. If he went to Chicago to the chief claim agent, he would send him back to me, because that is my job to handle in my territory.

Q. That is your territory and that is your problem?

A. That is right. That is what I am paid for, and am expected to handle.

[346] Q. Would anybody in the Philadelphia office or in Philadelphia have anything to do with a case like that?

A. They don't have anything to do with it, it is strictly a western region case, and this is the eastern region here. It is a different claim department altogether.

Q. And they wouldn't have any right to interfere?

A. If he went to any other claim department, the case would be referred back to me.

By THE COURT:

Q. Who is your boss?

A. Mr. Burke, chief claim agent, at Chicago.

THE COURT: All right.

MR. PRICE: Cross-examine.

CROSS-EXAMINATION.

By MR. RICHTER:

Q. As I understand it, you took your statements from these various employees or members of the crew after I had finished examining them with Mr. Pringle, is that correct?

A. All but Mr. Crum; I took his—it was about a month before we gave the deposition in Pittsburgh.

Q. How about Mr. Hirschmann?

A. I took his after he made his deposition in Pittsburgh.

Q. You remember Mr. Hirschmann testified he said he gave his ten days before?

[347] A. I don't know what he testified to. I only gave the truth. The only thing what I did, I took his statement at Pittsburgh right in our attorney's office after we had made the deposition.

Q. All right. He was being asked the question——

MR. PRICE: I object to this line of cross-examination.

MR. RICHTER: I can cross-examine him about certain statements——

MR. PRICE: I object to cross-examining this witness about what somebody else testified to in the deposition.

THE COURT: Yes. I sustain the objection, Mr. Richter, and give you an exception.

By MR. RICHTER:

Q. Now, you have told the Court and jury that you decided there was no liability in this case based on the statement given to you by Mr. Callen?

A. Yes, sir.

Q. Didn't you remember in this statement he said, "As we got near the cars, I figured that the engine was moving too fast and would hit the cars with a bang. I therefore dropped down off the stirrup before the engine coupled to the standing cars, which had air in them and wouldn't give much when [348] struck by the engine." Do you remember him saying that?

A. That is right.

Q. Of course, if the engine was coming back too fast, that was negligence?

A. But, he didn't say it was coming back too fast.

Q. Didn't he say it was moving too fast?

A. He said it "was moving at a moderately fast walking pace".

Q. You typed this statement?

A. That is right.

Q. And you were supposed to write down what he told you?

A. I did write it down.

Q. Suppose I read this sentence to you, "As we got near the cars, I figured that the engine was moving too fast and would hit the cars with a bang. I therefore dropped down off the stirrup before the engine coupled to the standing cars, which had air in them and wouldn't give much when struck by the engine." He said that?

A. Yes, sir.

THE COURT: What are you reading from?

MR. RICHTER: From the very statement admitted taken by this witness from the plaintiff.

THE COURT: That is his statement?

MR. RICHTER: That is the plaintiff's own statement taken by this witness and typed by him.

[349] THE COURT: What are you trying to show—you want to refresh Mr. Veidt's memory?

MR. RICHTER: That is right. Mr. Callen had told him on the date that he took this release from him, he told him that the thing was moving too fast, because he was afraid he would get knocked off——

THE WITNESS: No, sir; he didn't say he was afraid; he said they were coming so fast they would hit with a bang. It is customary for the brakeman to drop off; when they are standing on the stirrup they step off invariably before the coupling is made; they don't stand on the stirrup and wait until the last second and take the bang or jolt on the body; he stepped off the engine at a fast walking pace. He said he stepped off cars, many times, moving.

That is what he said, and that is what he signed.

By MR. RICHTER:

Q. Let's get down to the next point of the same statement, "As we approached the cars, I held my hand out, giving a steady sign, and I thought the engineman would stop, but he kept on coming at what I thought was too fast a speed for the coupling with me on the stirrup, so I dropped down on the crossing before the impact came."

A. That is what any brakeman would have done,—stepped [350] down before the impact. That would be the normal thing to do regardless of whether it was coming too fast. You don't stand on there and take the jolt,—

why should you? He said he gave a steady sign, expecting him to stop; a steady sign isn't a stop sign.

Q. Why did you take the man out to have him X-rayed?

A. Because, here is a man that claims he had a back injury on the railroad; the company provides every medical and hospital care. He didn't work for two months, and I thought it was my place to have an X-ray to see if there was anything wrong with him. If there was, see that he was referred to the medical department and that he got treatment, and could get straightened out and back on the job.

Q. You didn't want to find out what was wrong with the man to decide what the true value of the case was?

A. No.

Q. You weren't interested to find whether the man had a broken back and $250 wasn't a fair amount?

A. I based my idea of settlement on the negligence or liability; as far as settlement was concerned, I wasn't concerned with his injuries.

Q. You were not concerned with his injuries, you say, —what were you concerned with?

A. Except by his own medical report. That is what I [351] was basing it on. I was basing my settlement on the liability more than on the injury.

Q. You would have paid that same amount if a man had two legs off, is that right?

MR. PRICE: That is objected to.

THE COURT: Objection sustained.

By MR. RICHTER:

Q. As a matter of fact, your purpose in sending this man out was to see whether or not there was any kind of break in his back?

A. No——

Q. It isn't your job to look after his release——

A. Yes, when he doesn't take it upon himself to go to a doctor, and it is up to me to see that he is referred to or gets a doctor.

Q. You and the trainmaster knew all about Callen before he came,—you told the trainmaster he was coming?

A. Yes, because he would be reprimanded.

Q. Most of the medical care is handled through the relief department?

A. No——

Q. That includes medical care?

A. The company has surgeons or doctors in towns all along the railroad. The doctors that treat the men in the relief [352] department is separate,—that is more or less an insurance department. They examine you and tell you when you are able to work, or not.

By THE COURT:

Q. Are there any limitations placed by your superior officers on the amount that you are permitted to settle a case, based on your judgment,—are you bracketed?

A. Yes, I am.

Q. What, and how?

A. I am limited to $500 on my own authority; if I have to pay more than that I have to call my chief claim agent.

Q. Up to $500 you have discretion?

A. That is right.

Q. And above that you have to report to your superior officer?

A. I can do it either by correspondence or by telephone.

Q. If this man had had a real serious back injury and had made claim for a substantial amount, you couldn't have settled it at all over $500?

A. Not without getting authority from my chief claim agent.

Q. Before any settlement was made you would see that there was a thorough medical examination and report from the doctors, and every precaution taken by the defendant company to protect its treasury, is that correct?

A. That is correct.

[353] Q. And when you sent him to the physician you had in mind that idea, and had in contemplation the acceptance of $250, or not exceeding the $500, that he said he wanted,—and you knew it was within your jurisdiction to settle no matter what the testimony was?

A. I had discussed settlement with him before I referred him for X-ray examination.

THE COURT: All right, go ahead.

By MR. RICHTER:

Q. As a matter of fact, on your check which you have drawn there is printed, "Not good for more than $250.00"?

A. That is right.

Q. Didn't you tell this man if he wanted more than $250 that was your limit, and he would have to go to Chicago, knowing full well that this man couldn't travel all around the country trying to get a decent settlement?

A. I also have checks in the office for $500.00.

Q. Marked the same way?

A. Yes, sir.

Q. Do you have any for other amounts?

A. No, sir.

Q. You don't, don't you?

A. No, sir.

Q. Did you get a reading of that X-ray plate before the date [354] you made settlement with this man?

A. No.

Q. Did you know at the time you settled this case that this man had or was going to have a chronic back condition?

A. How could I? I certainly wouldn't know.

Q. You didn't know?

A. Positively not. Even the X-rays are negative when they came.

Q. It wasn't in your contemplation that this man had suffered a permanent chronic back condition when this settlement was made?

A. The only thing I knew about his condition was on the report that he brought in from his doctor. That is the only thing I had as to his condition.

Q. Now, I want a direct answer—you heard the medical testimony on behalf of the plaintiff in this case?

A. In part.

Q. Did you attempt to settle this case knowing that this man was suffering the injury that the doctors described in this court room?

A. No, I didn't know he had the injuries the doctors described in this court room.

Q. In other words, the nature of the injury was never in your contemplation at the time you assessed the value of [355] this case at $250.00?

A. I wasn't concerned with the injury; I was concerned with the liability, and I settled on the basis of no liability.

Q. You settled on the basis of no liability when the man told you the engine was coming back too fast, and that he jumped off the stirrup?

A. He didn't say it was coming back too fast to step——

MR. RICHTER: We will leave it to the jury.

THE WITNESS: He didn't say he was coming back too fast for him to step off.

By MR. RICHTER:

Q. Now, there has been some argument as to whether the accident happened on the 10th, or 14th—it may have happened on the 10th and the plaintiff may be in error—you typed on the check and the release that this accident happened at or near Tiro Hill on or about December 14?

A. That is right.

Q. That was the date the plaintiff said it happened?

A. That is the only knowledge I had to go on.

Q. Why didn't you wait to interview the rest of the crew in this case and find out about this accident before you attempted to settle?

A. We settle more cases on the injured man's own statement than any other way.

[356] Q. When you can settle for $50 or less?

A. Yes, sir.

MR. RICHTER: That is all, that is all.

RE-DIRECT EXAMINATION.

By MR. PRICE:

Q. Mr. Veidt, you can't settle for over $500?

A. That is right. If it is over $500 I would have to get a more complete investigation to state to the claim agent.

Q. And you would have to get this O. K.'d?

A. That is right.

Q. In this statement which you took from Mr. Callen, and which he signed, did he say this to you:

"I let go the hand rail on engine tank with both hands and just stepped down on the crossing. I figured engine was going slow enough that I could retain my balance all right. Judge engine was moving at a moderately fast walking pace when I dropped off. I dropped or stepped off of cars and engines many times moving that fast and considerably faster. When I stepped down off the engine, my body went into a twist for some reason and I hurt my lower back. That's the way it felt, but it happened so quickly that I didn't know exactly how I happened to twist my body. I didn't fall down on the crossing. I had stepped down before the engine [357] collided with the cars."

That is what he told you?

A. That is what he told me.

THE COURT: Will you let me look at the release and that other paper?

MR. RICHTER: Yes, sir. (Producing same.)

By Mr. Price:

Q. Was there anything in this statement or anything said by Mr. Callen at that time to the effect that the engine was moving too fast to make a coupling?

A. No, sir.

The Court: When you gentlemen come to discuss this release—I don't know whether you particularly noticed it or not—he says that he releases the Pennsylvania Railroad Company from "all claims and demands which I have or can or may have against the said The Pennsylvania Railroad Company for or by reason of personal injuries sustained by me at or near Tiro, Ohio, on or about December 14, 1944, while I rode freight brakeman; also for loss of time and all expenses incident to or resulting from said personal injuries." There are some features to that, at the proper time, in the absence of the jury, I want to discuss with you.

Mr. Richter: I had that thought in mind.

The Court: All right.

[358] By Mr. Price:

Q. Well, Mr. Veidt, that release marked Plaintiff's Exhibit 2 was the release which Mr. Callen signed at that time?

A. Yes, sir.

Q. He read it and he signed it after he read it?

A. Yes, sir.

Q. Did he say he understood what it said and what it means?

A. I always ask him that, to make sure they do.

Q. And what did he say?

A. He said he understood it. He understood that is all he had coming, that is all he would get, that was full settlement.

Q. And this check marked Plaintiff's Exhibit 3, was the check that you gave him at that time?

A. Yes, sir.

MR. PRICE: I offer the release and check in evidence.

(Plaintiff's Exhibits 2 and 3, referred to, were heretofore received in evidence, pages 28 and 29.)

MR. PRICE: I have nothing more from this witness.

MR. RICHTER: That is all, Mr. Veidt.

MR. PRICE: May I offer in evidence——

[359] THE COURT: Just a minute. Will you come to side bar, please.

MR. PRICE: I beg your pardon. Yes, sir.

(Conference at side bar.)

MR. PRICE: I would like to offer in evidence Defendant's Exhibits 1 and 2, and the paper that was marked Defendant's Exhibit 3.

MR. RICHTER: I object to Defendant's Exhibit 1, because the witness on being examined stated it was a shorter one that he identified. I have no objection to 2 and 3 going in.

I presume I have already offered Plaintiff's Exhibit 1, the X-ray report and release.

THE COURT: Let me look at the one you are referring to.

MR. RICHTER: This is the one everybody has been referring to in the examinations.

THE COURT: That is the report?

MR. PRICE: Yes, sir.

THE COURT: It has been quoted from at length?

MR. RICHTER: Yes, by everybody—parts have been read from it. I would like to offer it in evidence.

THE COURT: Mr. Price, would you mind letting [360] me know on what theory you object to this? I feel inclined to admit it, but there may be something I have overlooked.

MR. PRICE: Parts have been used, and I do not object to that.

THE COURT: You read pretty extensively from it. There are some other things in there that haven't been touched upon, and may be more or less irrelevant, I don't know. I think the most relevant matters have been read fully to the jury.

MR. PRICE: I think they have.

THE COURT: I wonder if we could—while it might be admissible, if we couldn't accomplish the same purpose by according to each side the right to comment on the parts that have been read?

MR. PRICE: That can be done.

THE COURT: Without admitting the other parts in the record.

MR. PRICE: That can be done. I have no objection to that.

THE COURT: On technical grounds, I think, probably, the objection should be sustained, but practically we can accomplish possibly the same purpose by giving free access to those parts that have been quoted and read to the jury. [361] I will sustain your objection, and give you an exception.

MR. RICHTER: Of course, we have Plaintiff's Exhibit 6, the X-ray report.

(The exhibits referred to, heretofore marked Defendant's Exhibits 2 and 3, are filed with these proceedings.)

THE COURT: You have the stenographic notes showing the parts that have been read into the record, and you can read those parts freely to the jury.

How about Plaintiff's Exhibit 6, have you offered that?

MR. PRICE: P-6 is all right.

MR. RICHTER: Exhibit 6, there is no objection—that is in by agreement.

(Plaintiff's Exhibit 6, referred to, is filed with these proceedings.)

MR. RICHTER: Defendant's Exhibit 1 is out.

MR. PRICE: I offered D-1, but Mr. Richter objected.

MR. RICHTER: Mr. Callen said he received a notice from the trainmaster, but said it was shorter—he never said he received this one, Your Honor. In fact, he didn't.

[362] THE COURT: Was there any evidence about that?

MR. PRICE: Yes, sir, the plaintiff testified about it, testified that he received it. That is the letter referred to in this other letter which Mr. Richter says he has no objection to.

THE COURT: There was something to this effect—I am not sure whether it was true of the exhibit itself or the testimony relating to it—to its receipt.

MR. PRICE: The same matter is referred to in it, in order to make it complete.

MR. RICHTER: He said he received some letter from the trainmaster, and on having been shown this he said he got a letter from the trainmaster, but said that is the one he got, that is, the shorter one (indicating).

THE COURT: Which one do you object to?

MR. RICHTER: The first one. The second one I have no objection to.

MR. PRICE: The second one refers to the first letter.

MR. RICHTER: Well, let them both go in. I withdraw my objection.

(Defendant's Exhibit 1, referred to, is filed with these proceedings.)

THE COURT: Anything more, gentlemen?

[363] MR. PRICE: If I may have a moment, Your Honor. I am sure I have everything in, but if I may take a look——

THE COURT: All right, take a survey.

MR. PRICE: I think I have covered everything. That is the defense.

THE COURT: Any rebuttal?

MR. RICHTER: I was going to call an X-ray doctor merely to show how fast you can get a reading on the plates.

THE COURT: That depends on the X-ray.

MR. RICHTER: I want to show that tomorrow.

THE COURT: X-ray men are like some lawyers, some are and some are not—or, some judges with their opinions.

MR. RICHTER: I was going to call Dr. Farrell.

THE COURT: Can you and Mr. Price agree on what might be a reasonable time?

MR. PRICE: Of course, a doctor might do it in half an hour or an hour, or even longer. If the doctor himself isn't there at the time the X-ray is taken—it might take longer.

THE COURT: Five minutes and various times?

MR. PRICE: It has taken, maybe, as much as three days.

[364] THE COURT: And the chiropractor—we are not going to put the chiropractor on trial.

MR. RICHTER: Is Your Honor going to adjourn?

THE COURT: Yes. The jury has done very well considering the excitement last week.

Members of the jury, you may retire now, and tomorrow morning we will hear counsel argue this case.

Keep your minds open and don't make any arrangements tomorrow to take lunch with your friends. I don't want to interfere with any outside arrangements tomorrow, as it may be necessary to keep you all together. I do not want something done or something said and the whole case go, as we say, flooey; it would be love's labor lost, and I

will have to keep you together tomorrow, when we hope we will be able to let you decide this interesting case.

In fairness to both sides, this has been a great crisis in our national life, and we know feeling has been running a little bit, but don't let anything on the outside in the way of industrial economic difficulties and disputes affect us in this temple of justice. Here is one place where these things do not and should not raise their heads. And we are all trying, in this almost sacred place, this temple of justice, to do justice between these parties with their respective stories, feelings and viewpoints. If [365] we haven't that attitude here and we can't get justice here then there is nothing left. I know you can approach the question free of any feeling that might have been expressed in the last week. You are jurors now. You are in the temple of justice, and you are members of this temple—you are not just ordinary citizens today. There may be some feeling on the one side or there may be some feeling on the other side, but don't have any feeling in the jury box, please. Just the plain truth is all we want.

MR. PRICE: Do I understand all the evidence is in and we are through?

THE COURT: All the evidence is closed, is that correct?

MR. RICHTER: That is correct.

THE COURT: Evidence closed. All right.

(Whereupon, at 3:47 o'clock P. M., this trial is adjourned to Tuesday, May 28, 1946, at 10:00 o'clock A. M.)

FIFTH DAY.

[366] Philadelphia, Pa., May 28, 1946.

Before Honorable George A. Welsh, *J.*, and a Jury.

Present: B. Nathaniel Richter, Esq., and Joseph S. Lord, 3d., Esq., for the Plaintiff.
Philip Price, Esq., and Scott Seddon, Esq., for the Defendant.

The Court: Any points for charge, gentlemen?

Mr. Richter: Oh, yes, sir.

Mr. Price: I presented some general points, and also a motion for a directed verdict. (Presenting same.)

[367] The Court: Do you mind gentlemen, if I look these over before you start.

Mr. Richter: May we have about five minutes, Your Honor?

The Court: Yes.

(Informal recess.)

The Court: Mr. Richter, in the first of your points you use the word "life"; I think that should be "life and limb".

Mr. Lord: Yes, I agree with Your Honor.

The Court: With your permission, I will amend that, and put that in, "life or limb".

All right, Mr. Price, your motion for a directed verdict is made of record. I overrule it and give you an exception.

Mr. Price: Will Your Honor reserve it for further consideration instead of disposing of it now?

The Court: You mean to let the jury pass on the facts first?

MR. PRICE: No, you refer to it as a question of law for further consideration.

THE COURT: If you want to discuss it, I will let the jury retire.

MR. PRICE: No,—as Your Honor pleases.

[368] THE COURT: I will do whatever you gentleman want.

MR. PRICE: Anyway,—I think you could do it either way, but if Your Honor disposes of it now, that is all right with me.

THE COURT: Now, members of the jury, the lawyers on both sides of the case are going to argue from their respective viewpoints on the evidence that has been presented to you. This is a part of the trial, and is a very important part of the trial. Each side is represented by competent lawyers, and they are entitled to have not only an opportunity to argue their viewpoints on the evidence, but they are entitled to get and receive the careful consideration on the part of all of us to these arguments. So, there is no time limit set. The lawyers can take whatever time they feel necessary to adequately and completely analyze the evidence and reason it out with you. So, if you will please listen to what both sides have to say, and then remember that in the last analysis the decision will be entirely for you. But, this is a very important part of the case. If you had a case you would want the jury to listen to your attorney, whichever side you are on. Just listen to these attorneys, and we will have their views on the various phases of the testimony, which will be finally submitted to you and your conclusion will be [369] final.

Now, Mr. Richter.

(Opening argument to the jury by Mr. Richter on behalf of the plaintiff.)

THE COURT: Mr. Price.

(Argument by Mr. Price to the jury on behalf of the defendant.)

THE COURT: Mr. Richter?

(Reply argument by Mr. Richter to the jury on behalf of the defendant.)

THE COURT: Do you want to take a recess to relax a few minutes, just for five minutes. You listened very patiently, and before any further burden is inflicted on you I think you ought to have a chance to come up for air. I am going to charge you in a few minutes, and I think you will need a little rest.

(The jury retires.)

THE COURT: In the absence of the jury, I would like to ask you and Mr. Price your views with reference to the supplemental point that you have submitted to me. It has given me considerable concern——

(Discussion off the record.)

THE COURT: All right, call in the jury.

(The jury returns to open court.)

PLAINTIFF'S EXHIBIT 2

L. D. 6-A.
15M 5-1-44 8½ x 11-F.
C. A. 4763
February 14, 1945—Draft No. 18630

THIS IS A RELEASE

I, Rudy E. Callen, for the sole consideration of Two Hundred Fifty No/100 Dollars lawful money to me paid by The Pennsylvania Railroad Company at the time of the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have released, and by these presents do release, unto the said The Pennsylvania Railroad Company all claims and demands which I have or can or may have against the said Pennsylvania Railroad Company for or by reason of personal injuries sustained by me at or near Tiro, Ohio, on or about December 14, 1944, while a road freight brakeman; also for loss of time and all expense incident to or resulting from said personal injuries.

I agree that The Pennsylvania Railroad Company in paying the said sum of money does so in compromise of said claim and demand above released, not admitting any liability on account of the same.

I further agree that I have read this release and understand that it states the entire agreement relating to the settlement of the claim herein mentioned; and that the sum of money stated herein is all that I am to receive.

IN WITNESS WHEREOF I have hereunto set my hand and seal this fourteenth day of February One Thousand Nine Hundred and Forty-five.

Rudy E. Callen.

This release was read and signed by the said Rudy E. Callen in our presence at Toledo, Ohio, on the 14th day of February 1945.

Edward C. Burck,	Toledo, Ohio
(Name)	(Address)
R. E. Veidt	Toledo, Ohio
(Name)	(Address)

PLAINTIFF'S EXHIBIT 3

C. A. 4763

THE PENNSYLVANIA RAILROAD COMPANY

No. 18630

NOT GOOD FOR
MORE THAN $250.00

Toledo, O., February 14, 1945

PAY TO THE
ORDER OF Rudy E. Callen $250.00
Two Hundred Fifty No/100 Dollars

TO THE TREASURER OF THE PENNSYLVANIA RAILROAD COMPANY
Philadelphia, Pa.

Through
THE PHILADELPHIA NATIONAL BANK
3-1 Philadelphia, Pa.

THE PENNSYLVANIA RAILROAD COMPANY

R. E. VEIDT,
District Claim Agent

In full settlement and satisfaction of all claims, demands and causes of action resulting from an accident at or near Tiro, Ohio, on or about December 14, 1944.

Rudy E. Callen

PAYMENT RECEIVED
Prior endorsements guaranteed
3-1 EB 19 3-1
PHILADELPHIA NATIONAL BANK
D. REINHOLD, Cashier

PAY FARMERS DEPOSIT NATIONAL BANK
124
Pittsburgh, Pa. or Order
May, Stern & Company
PAY TO THE ORDER OF
ANY BANK, BANKER
OR TRUST CO.
Prior Endorsements Guaranteed
FEB 19 '45 3008

PM
2060

FEDERAL RESERVE BANK
OF PHILADELPHIA 3-4
PAY TO THE ORDER OF
ANY BANK, BANKER OR TRUST CO.
Prior Endorsements Guaranteed
FARMERS DEPOSIT NATIONAL BANK
Pittsburgh, Pa.
8-11 M. E. BOYLE, Cashier 8-11
FEB 16 1945

(Perforated)
Paid
2-20-45

PLAINTIFF'S EXHIBIT 4

PITTSBURGH, PA. 4 1945
APR 26
4—PM
THIS SIDE OF CARD IS FOR ADDRESS

Rudy E. Callen
New Brighton, Pa.
R. D. #2,

C. A. 4763
Room 228, Penna. Station,
Pittsburgh, Pa.

No. 2

Dear Sir:

In connection with your disability you have failed to call at my office as requested. In order that further Relief Fund Benefits be allowed, it is necessary that you call at my office as soon as possible.

Please bring this card with you.

If unable to call, write.

You may call at the nearest Medical Examiner's Office.

Very truly yours,

DR. R. D. SAUL,
Medical Examiner.

PLAINTIFF'S EXHIBIT 6.

(Copy)

DRS. DEMING and THOMPSON, 319 Medical Building, 316 Michigan St., Toledo 2, Ohio

Name of Patient Callen, Rudy Address New Brighton, Penn. R # 2.

Part to be Exam. Cervical and lumbar spine

Clinical Diag.

Referred by Mr. Veidt, Claim Agent, Penn. R. R. Co.

No. D7194

X-Ray Findings Date 2/14/45

The bodies of the cervical and lumbar vertebrae are regular in outline and show no evidence of any fracture or dislocation. The angle formed by the last lumbar vertebrae and the top of the sacrum is within normal limits. There is incomplete union of the posterior arches of the first sacral segment due to a congenital anomaly.

M. M. Thompson, Jr. M. D.
C. A. 4763

DEFENDANT'S EXHIBIT 1

Conway, Pa. June 15 1945

Mr. R. E. Callen
RD-2 New Brighton, Pa.

Our records indicate that you last performed service as Brakeman on the Eastern Division on December 21, 1944. However, there is a record of reported disability starting either the day following that on which you last performed service or on some date subsequent thereto.

In connection with the reported disability you have either neglected to report to the Medical Examiner for vertification of disability or have refused to comply with the request of the Medical Examiner that you report to him and as a result of your failure to report to the Medical Examiner the disability was considered by the Medical Examiner as having ended.

Therefore, since the date the Medical Examiner considered the disability as having ended, you have, in effect, been absent from duty without permission.

Kindly arrange to report to this office within 10 days from the date of this letter and explain your continued absence from duty without permission or advise us prior to that date any reason you may have for not reporting within the time specified. If you are not able to report because of disability advise the nature of the disability.

Unless we hear from you within 10 days you will be presumed to have resigned from the service of the Company.

DEWEY WELDON,
Asst. Train Master
C. A. 4763

DEFENDANT'S EXHIBIT 2.

THE PENNSYLVANIA RAILROAD
EASTERN DIVISION
Pittsburgh, Pa., July 7, 1945

Mr. R. E. Callen,
R. D. #2,
New Brighton, Pa.
Dear Sir:

Referring to our letter of June 15, 1945 in connection with your absence from duty without permission.

Due to the fact you failed to report or advise your reason for not reporting within the specified time your seniority has been forfeited and your name removed from the Roster of Brakeman, Eastern Division.

Yours truly,

J. L. Pringle,
Freight Train Master.

I&W 5-9-45

C. A. 4763

DEFENDANT'S EXHIBIT 3.

PHYSICIANS REPORT OF PERSONAL INJURY

To: The Pennsylvania R. R. Co.

New Brighton, Pa., Feb. 13, 1945
Place and Date of Report

Name of Injured: R. E. Callen. Age: 34.
Address: RD 2 New Brighton, Pa. Occupation: Brakeman
Place and Date of Accident: Tiro Hill, west of Vernon O Dec. 14, 1944.
Nature and Extent of Injuries: Twisting of body producing nerve pressure and inflammation in sacro illiac and lower lumbar region of spine.
Cause of Injury as Related by Patient: Stepping off engine stirrup.
Treatment: Chiropractic adjustments to remove pressure.
When First Consulted: Dec. 28, 1944.
When Was Patient Discharged: Not yet.
Were X-rays Taken: No. By Whom:

C. A. 4763
C. R. Fair, D. C.
(Signature)
1208—5 St. New Brighton, Pa.
(Address)

Prognosis—Probable Extent of Disability—Describing any Scarring, Deformity or Permanent Effects of Injury: Leaves a weakness which is more readily increased and makes him more susceptible to recurrence.
Remarks:

CHARGE OF THE COURT.

Philadelphia, Pa., May 28, 1946.

WELSH, *J.*

Members of the jury. You have listened very carefully and patiently to a very interesting case. I think you have found it interesting,—I know I did. It becomes particularly interesting just at the time when it closes because of some things which have happened that brought everything home to us, and we realize the importance of all these public activities in a great nation such as ours today. We have taken so many of our blessings without thought of how wonderful they really are.

We have listened to this case which we are trying under the provisions of an Act of Congress dating back, I believe, to 1908, and in order that there will be no misunderstanding I am going to read to you the relevant portions of the Act, which provides as follows:

> "Every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia, and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, wharves, or other equipment."

That is the Act under which this suit is brought, the plaintiff claiming that there was negligence on the part of the engineer of the train, or the man who was operating it, a fellow employee, and that comes within the provisions of this Act. I do not think there is any charge by the plain-

tiff that there was any defect in the workmanship or in the equipment of the engine,—it was the human factor, I believe, that the plaintiff says caused the injury.

Now, this injury occurred on a stretch of tracks between Conway, Pennsylvania, and Toledo, Ohio, back in 1944, I think it was. It was on a section of track known as in the locality of Tiro Hill. There were 80 cars in this train, which was being pulled by one of the largest engines of the Pennsylvania Railroad, and that means one of the largest engines in the country, because the Pennsylvania Railroad is up to date and progressive in its equipment and everything that goes to make one of the most successful railroads in the world. It was an unusual occurrence; one of the members of the train crew said that it was a very unusual thing to have that kind of a stalling with that powerful engine. But, it was a very large train, 80 cars, and each car about 50 feet long, or 4,000 feet from head to tail; that was over three-quarters of a mile long,—a great long train of cars, carrying the commerce of a great nation to and fro. It is romance when you come to think of it; day and night these great trains going across our country, supplying the nation just as the arteries supply blood to the human body.

Now, something happened there according to the plaintiff's story, and we are asked today to recast the whole affair and try to give as accurate a picture as we possibly can gain from the evidence of both sides as to what happened.

First of all, members of the jury, you are going to be guided very largely in coming ~~to a~~ conclusion in this case by two elements; one is the element of truth on the part of the witnesses and the other is the opportunity on the part of the witnesses to see and know what actually did happen. It is surprising how very little perjury there is in a court room; there are myriads of instances where the testimony is divergent and often entirely opposite, and notwithstanding what the layman may think about such confusion of tongues as constituting a babble, apparently, there

is very little perjury as such. You have got to take into consideration the ability of the witnesses to know, to see, and to hear, the natural coloring that comes from the part that they play in the action itself, whether there is a possible culprit, blameless or blameworthy, or whatever may be his position in the drama. And secondly, you have got to consider his own self interest in the case. All these things are elements that go to affect human testimony, because it will cause a variation in the testimony without any desire at all to commit perjury.

We will take up Mr. Callen first; he is the plaintiff and was the first one to testify. Mr. Callen sits in the court room on the front bench. He took this witness stand and laid his hand on the Book, and he told you who he was, what he was, and his version of this occurrence. You watched him, and I watched him. Now then, in your opinion, was he telling the truth from his viewpoint as far as he was able to tell, bearing in mind all these elements that I referred to, was he telling the substantial truth or was he manufacturing something out of the whole cloth? Because, members of the jury, if he came here and put his hand on that Book and deliberately told you of an incident that never happened, then there is nothing in this case and you need not worry any about it. Or, did something happen on that day going up Tiro Hill? There was an unusual occurrence,—80 cars,—and there was the crew; they are almost like a family. You saw from the records that they work day after day, taking the cars to and from points on the railroad; they work together; there is good teamwork, and there is a brotherhood among them; there is a fraternity among them,—they risk their lives day and night, and the common hazard or the common cause tends to bring them somewhat together. They are out on the firing line, and this unusual event happened, where they had to uncouple this great long train and push one-half of the cars up, and then come back and get the other half and push it up Tiro Hill, a considerable distance,—or with

loss of time,—and, of course, in any railroad blocking, ordinary traffic has to be carried out with a certain degree of efficiency and possibly with some hazard brought about by throwing out their own schedule and affecting other trains that might be using the same piece of trackage.

Now, what happened? He tells you that the engineer was running the engine backward to make up the final coupling with the engine and tender with the other part of the train, and wasn't in charge of the regular engineer and which will be explained later. The regular engineer during this period was down helping the fireman. You can imagine going up that hill, a long pull, with a long train, what a tremendous strain it must have been on the fireman stoking that engine, that 'coal eater'. There was the engineer, a different grade of workman entirely, who comes down and helps the fireman,—that is team work; he leaves the throttle, and helps the fireman and gives him a breathing spell, and helps the fireman stoke; he is down there on the bridge shoveling coal, while the pilot is running the engine. Now, the pilot was an efficient engineer, there is no doubt about that; he was particularly familiar with this piece of road, and the regular engineer, probably equally as efficient, was not famiilar with that route, and therefore in the interest of safety and general efficiency they put this pilot on in that piece of territory or trackage that the regular engineer was not familiar with; he told you how he had goggles on, and that he was looking out observing what was going on,—on the alert.

Now, if something happens, what caused it? If nothing happens it is all over. Now, I do not know how you feel about it, and I do not know what the facts are, but you remember that the pilot enginer was asked if he had ever run that engine before, that individual engine, and he said "no", but that he had run the corresponding type of engine. You will remember Mr. Callen was teamed up with the regular engineer, who knew this particular type of engine most intimately, like the driver used to know our horses, Mr.

Callen also had been dealing with his regular engineer on the matter of their mutual signals and responses to the signals. He tells you in order to see that this coupling was made in safety he got out of the shelter on the tender and was *riding on the stirrup and signaling* back to the engineer, as all of you must have seen done so many times you know exactly what they do, and he said that the engineer, apparently, had not paid any attention to his signals because he kept coming without reducing speed when he was giving the "steady" or "slow, steady" sign, and at last he gave the sudden signal to stop, because he realized, according to his judgment, that the engine would probably bump into the cars with the speed it was coming and throw him off the stirrup and possibly result in his death or serious injury, and he said he jumped.

Now, members of the jury, if you believe he is telling the truth,—not whether he is entirely accurate,—I am going to leave that out,—if he is telling the truth and he did jump, then you have to ask yourselves what did he jump for, what caused him to jump; what are the things that would make a railroad man,—I think he said he was with the company for sixteen years, and he is thirty-six now,—what would cause him to jump off that mighty locomotive down to the side of the railroad? It is up to you to say what happened, if anything. There is no claim made that when the final impact was made that the impact was at an excessive speed. Even the regular engineer said he stood there with himself braced expecting a possible jar that would come from stopping any car,—we do it on a passenger train when we come to a station, especially if we are standing up. He said there was no jarring, it was a good impact, good coupling. Now, Mr. Callen says when he landed he may have slipped on a piece of ice or something but he twisted his back.

After that, what is the next step. He gets back on the train, and you have his testimony showing what happened as far as his activities are concerned after that, and I am

not going to go into the evidence with you, because it has been so thoroughly and ably gone over by counsel, but he says he thought his back was just sprained, and he had his wife rub his back with liniment, expecting that it would be all right again. At that time he was a man weighing two hundred pounds, and he told you he was five feet, eight inches, and the weight that he gave us was the weight in his clothing, not stripped, but probably stripped he would weigh around two hundred pounds,—an active outdoor life. You can imagine how men who are used to outdoor life takes these things in their stride, and that they are used to getting a certain amount of bumps and sprains, I guess. I know I have in my active life, and some of you who have been active, surely have had it, and a strong, vigorous man is apt to pass these things over not too seriously because he is used to getting bumps. He said he didn't report it immediately because he said he thought he would be all right.

Now, his back didn't respond to the treatment by his wife, rubbing liniment, that she put on, and some weeks went by, just exactly how many I don't know, and I will leave that up to you, and he finds himself out in the office of the claim agent and there, apparently, from his own testimony, he didn't know he was seriously injured,—that is in February,—because he asked for five hundred dollars, I think it was, but it was a certain amount, and you will bear that in mind, and Mr. Fred, I think, or——

MR. RICHTER: Mr. Veidt——

THE COURT: Yes, the claim agent, said that he would give him $250.00. He took him to a chiropractor and had him examined, and then they went back to his office, and Mr. Callen said he would take the $250.00. He wanted $500.00, I think, he said then. But, Mr. Veidt told us on the stand that he had no power to settle for over $500.00; that he had the option to settle cases where he thought there was no liability or damages were not great for an

amount up to $500.00. Mr. Callen was not notified as to the findings of the chiropractor——

MR. RICHTER: The X-ray.

THE COURT: If he had been notified of the findings of the chiropractor I don't know what effect it would have had, because the character of the injuries he sustained, according to the physician, are such that they would not have been revealed by the X-ray,—you heard it described by the doctor,—and some of you members of the jury, the women particularly, may know something about X-rays. X-rays do not show up certain injuries to the muscles, tissues, nerves, and so forth, but the bones and malformation of the solid substances they show up everything very very clearly. Anyhow, they settled to the extent of $250.00, and the release has been offered in evidence and admitted, and both sides agree that that release was not in contemplation of any sort of permanent injury.

Now, members of the jury, you cannot agree to something you don't know anything about and didn't intend to cover. I want to make this statement, and I hope that the defendant will not object to it, because I can't imagine that a responsible and reputable employer, whether individual or corporate, would knowingly,—knowingly,—commit a fraud on an employee. I think if it had been known that this man had these permanent injuries Mr. Veidt would not have handled the matter; it would probably have gone to Chicago where Mr. Callen said he was sent when he couldn't settle for $500.00. Therefore that release was given and taken, and Mr. Callen received $250.00.

Now, I am going to consider that release as binding to the amount of $250.00, and if you find a verdict for the plaintiff you will deduct that from any amount you would otherwise give him. The $250.00 he got for expenses and medical bills and services that he obtained up to that time; and if you find that he is entitled to a verdict at your hands I will ask you to deduct that $250.00 from any amount you otherwise would award him, because that is what he agreed

to take toward that particular phase of his claim, and of course he would not and does not ask, as I understand it to be excused from that,—he admits that he got it, and there it is.

The release, as I have told the attorneys for both sides, I do not consider binding insofar as it applies to his permanent injuries, because the Pennsylvana Railroad certainly didn't know he was permanently injured, and if they did know he was permanently injured and settled for $250.00 the comment of the Court might be entirely different.

Now, you heard the doctors' testimony as to his injuries. I am going to leave you to pass judgment upon how far this man is impaired, whether partially impaired, whether partially mpaired permanently, or whether he is impaired in his earning capacity at all. I am going to leave that entirely to you. You heard his statement, and he was put under cross-examination; he told you the kind of work that he can do and can't do, and the doctors have testified, and you know all about that more than anybody can tell you; neither side can tell you any more than they have done. I think I ought to call our attention to the fact that the doctors did say that some of the symptoms that were discovered to exist in the lower back region of the plaintiff were symptoms that could not be simulated or controlled by the patient; in other words, they were involuntary. You know if they take a pin and touch you or prick you, you say "ouch" if it hurts, and that you can simulate pain and say "ouch". But, when it is involuntary it shows up by a spasmodic movement of the muscles involved, that is a different matter. I am going to leave you to say in your experienced judgment just how far he has been impaired.

Now, members of the jury, you will have to consider here the question of negligence of the defendant and the contributory negligence of the plaintiff, if any. You will have to decide whether the company was negligent or not,

and whether the plaintiff contributed to the accident by any negligence of his. As I read to you from the Act the Railroad Company is bound to furnish competent, safe employees, and if the negligent act of one of the employees involves physical injury to another employee the company is liable. Now, if the plaintiff in this case under all the circumstances of the case was negligent himself in the way that he conducted his own acts on that day—negligent under the circumstances—and you believe he was negligent to such an extent that he partially contributed to it, you will determine just in what proportion, relatively, did any negligent acts, should you find them to exist, contribute toward this accident. Just to illustrate the point—and it is pretty hard to put this down in figures, I will admit that—but suppose you would say it was one-third, that you would consider he was partly responsible for this to the extent of, say, one-third, then you would diminish any amount you are going to give him otherwise, if he had been free from negligence, by one-third. That is, try to get as fairly as we can in the way of justice toward the parties. The company is not free from liability but if he contributed to it himself, why, then, any amount that would otherwise be awarded, would be diminished accordingly. That is, provided there is negligence on the part of the fellow servant or servants in this case. I hope I have made that plain.

Now, when you come to compensation, that is always a difficult question, because no matter whether you are a lawyer, a doctor, workman or mechanic, whatever it may be, and whatever you do, there is always a question of what is fair compensation. That is what is rocking the world today; that is just what is getting the world by the ears today—what is just compensation? So, you will not be surprised that juries have trouble arriving at what is fair compensation. The whole world is going rather topsy-turvy about this question of compensation. In that connection you will have to consider many things. You will have

to consider his age, his physical condition, the type of work that he did, his probable length of life, the hazard of his occupation that might end his life instantly at any time, and any other elements that you think would be controlling or have weight in coming to a conclusion as to what compensation he should receive. He is thirty-six years of age, and the Carlisle Table gives him an expectancy of life as testified to, and commented on by counsel.

That does not mean, members of the jury, you are obliged to take that length of time as being an absolute guarantee that he is going to live that number of years given by the Carlisle Table or other actuary tables. It means that the probabilities are he will live that long if nothing unforeseen happens; that is the prescribed length of life; that is all it means, and, it assumes that he is in good health at the time.

Now, you have to consider the ravage that time itself makes on our earning power. I am going to distinguish very carefully between his earnings that he has lost and the loss of earning power. He claims that he has lost so much in the way of earnings. There will be submitted to you certain figures so that you will not have to compute that, if you find for the plaintiff then, as I said before, from these two items you will deduct the $250.00 that has been paid.

Then, you are going to pass to another and far more difficult phase of this litigation, and that is, what will be his loss of earning power? Now, the loss of earning power is diminution of the power to make your living, earn your living; you take a man in full possession of his faculties, bodily and mental strength unimpaired with ability to earn a living, he has a certain definite earning power as a full grown, competent, sane man in the community in which he lives to earn a living—that is earning power. Now, suppose something happens to him and he is injured, his legs or arms, or some part of the body, and he can't function, say, more than fifty per cent of his normal capacity, well, then, his earning power has been reduced correspondingly

—that is, his earning power for the future; so, if you find that Mr. Callen as a result of this accident had a decreased earning power of a certain percentage and that he had a prospective life of so many years, and you have made due allowance for the decrease in earning power by the passage of time, it gives you a yardstick to measure his loss of earnings in the future by his loss of earning power. Now, time does lay a heavy hand on all of us. At fifty, even if he never had an accident, he wouldn't have the same earning power as he had when he is thirty-six, not in that work in which he was engaged. If he were a doctor, a lawyer, or a judge, that wouldn't be true to such an extent because the physical work and strain is quite different on a professional man, and possibly on a business man, but when a man is doing the kind of hard, physical work that this man did his greatest asset is a clear mind and a strong body, and if they are impaired his earning power is impaired, and time will work havoc on him. So, while he might make a certain amount of wages now at thirty-six, when he is fifty-six or sixty he might not have that earning power at all. While it may be true he might have gotten promoted in his line, but that is prophecy that you can't fulfill in your imagination because we don't know anything about that. We can only take things as they are. He has devoted his life to outdoor railroading; that is his calling.

Now, you have another element which requires compensation, and that is pain and suffering. You have often heard that expression, "pain and suffering." It is pretty hard to compensate for pain and suffering because you wouldn't find any sane person who would voluntarily submit himself to pain and suffering just for a money return. A person would be crazy who would endure a toothache or bodily ill just for the sake of getting so much money a week coming in—he wouldn't be normal. We shrink from pain and suffering and you might say I wouldn't endure what a certain plaintiff has to endure for the national debt or for all the money in the treasury, or something like that,

but when you are in a court of justice, members of the jury, you would not be doing justice if you didn't take into consideration when you come to make your assessment of damages—assuming that you are going to give him anything, the pain and suffering that he would endure—the nights when he can't sleep, the nervousness that it brings about by being apprehensive of the future—a working man not being physically able to pursue his calling, what he is going to do—all this anxiety that besets him, as well as the real physical discomfort that he feels, are disabling to a certain degree. Now, you have to be fair and reasonable in that; you can't be extravagant. You are dealing with other people's money. It is not fair for a jury to be lavish or extravagant with other people's money, but it is their duty to be fair and just, and that is what this court is for.

Now, members of the jury, all these things I am mentioning to you because you have to go out into the jury room and you have to approach this question along scientific and common sense lines. You can't go out and say give him so and so, and bridge that question. You must consider all the elements that constitute the problem and try to solve it in the line of reason and fair play toward both sides.

Now, I want to say something about any award that you might make. Suppose after all the consideration that you give to these various questions that I mentioned and to any others that you will raise yourselves you feel that you should compensate the plaintiff with a sum of money. Remember that this is 1946, and if you are going to award him something now it is a matter of a future award, and you got to consider the present worth of a dollar. In other words, if you give a man a certain abstract sum now —I will not mention any particular sum because it might be thought to be a yardstick that might influence you, but, take any sum of money that you want, take a hundred dollars—and I don't think anybody will criticize that illustra-

tion—well, you give a man today the hundred dollars, and he is going to have the use of it for a year, and if you give the same hundred dollars over the twelve months, at $12 a month, in twelve months at $12 a month he would get $144.00. But, if you give $144 now, then he has the money and the interest on it until it has all expired, and you have to consider what is its present worth. That is an old problem in mathematics that we learn in our school days, and a number of you understand it. You can't have the cake and the penny, too. You can't say we will give him a hundred dollars, but you will have to give him such sum of money which over the period of time you think he would be incapacitated either partially or wholly would amount to a hundred dollars, the total amount. I hope I have made that clear.

Now, the parties have asked me to charge certain things, and have handed me up points for charge, and I will take them up now. I will take the plaintiffs up first——

MR. RICHTER: I am going to withdraw all my points except the supplemental.

THE COURT: You withdraw——

MR. RICHTER: All except the one supplemental point.

THE COURT: All right, very good.

With reference to the defendant's points—Mr. Price, did I cover the points which you have submitted?

MR. PRICE: I think not—not everything—Your Honor. I submitted them in good faith, and I still ask Your Honor to read them to the jury.

THE COURT: All right, I will do that.

"1. Under the Federal Employers' Liability Act the Plaintiff has a right of action only if his damage was caused by some negligence of the railroad company and, therefore, unless you find that the railroad company was negligent 'and that such negligence con-

tributed to or caused the Plaintiff's damage, your verdict must be for the Defendant railroad company."

I affirm that. I think I covered that in my charge to you.

"2. Under the Federal Employers' Liability Act the Plaintiff has the burden of proving the Defendant's negligence by a fair prepondera ce of the evidence. If therefore you find that the weight of the evidence is against the Defendant's negligence, or if you find that the evidence on the subject of negligence is equally balanced, in either of those cases your verdict must be for the Defendant railroad company."

I affirm that. I think I covered that in my charge to you.

"3. If you find that the evidence in the case and the reasonable inferences to be drawn from the evidence lead with equal force to two or more causes for the accident, for only one of which the Defendant would be responsible, you may not speculate as to which one was the cause of the accident and your verdict must be for the Defendant railroad company."

I affirm that point.

"4. If you believe that the Plaintiff was, on the date of the——"

MR. RICHTER: I am objecting to this point, if Your Honor please.

THE COURT: I decline that point. No. 4 is declined.

MR. RICHTER: I think No. 5 is correct.

THE COURT: Now, No. 5:

"5. In order to avoid a release on the ground of mutual mistake of fact as to the injuries intended to be included in said release, such mistake must relate to an existing fact and not merely to the future result or progress of an existing and known injury."

I affirm that point. I tried to make that very clear to you, members of the jury.

"6. If you believe that at the time the Plaintiff executed the release he had been advised by his own doctor that he had not been cured and that further treatments would be required, in that event the Plaintiff was not misled by anything done by the Defendant and you must accordingly find that the release is binding and valid and your verdict must be for Defendant."

Members of the jury, I affirm that point with this explanation, if you believe that at the time the plaintiff executed the release he had been advised by his own doctor that he had not been cured and that he believed he had not been cured—I don't know what evidence there is, I will leave that entirely to you, as to what the doctors have advised this man at the time he consulted with Mr. Veidt, that he had not been cured. But, he did state he didn't know he was permanently injured, and Mr. Veidt said he didn't know he was permanently injured, and they both settled on the basis of loss of wages and expenses and because Mr. Veidt felt there was no liability and that it was just a local matter. With that explanation, I affirm that point. If he believed and he knew full well he was injured the way he is today and he made a settlement for $250.00, then he would be bound by it.

I decline No. 7.

MR. RICHTER: I ask Your Honor to read No. 7.

THE COURT: I decline that point.

MR. RICHTER: We are asking Your Honor to read it. We are not going to oppose its reading, even though——

THE COURT: All right.

Mr. Price, you presented this point, No. 7, and usually when we decline a point we don't read it. It will be a matter of record that you handed it up, and if both parties ask that it be read—do you have any objection?

MR. PRICE: I do not think you should read any point that you decline.

MR. RICHTER: I ask that it be affirmed, Your Honor.

THE COURT: Suppose I decline that point; and I will not read it, and give you an exception.

MR. RICHTER: I ask that it be affirmed for the reason that I want to eliminate any type of error or any possible error. I think irrespective of any verdict to which we may be entitled, we would like to have it, and we ask Your Honor to reconsider your decision.

THE COURT: It is customary not to read a point that is declined.

MR. RICHTER: Yes, but we ask Your Honor to affirm the point and read it as given.

THE COURT: You want it affirmed?

MR. RICHTER: Yes, for the purposes of the record.

THE COURT: All right.

"7. If you believe that the execution of the release was based partly if not entirely upon the question of liability and not upon any representations as to the extent of the injury, the release is binding upon the plaintiff and your verdict must be for the defendant."

Both sides being asked for it, I affirm that point. I felt I had covered that in my comment on the release and it seemed to me that some of the points were simply ramifications about specific points that I need not affirm because I thought I had substantially complied with the spirit of the point, but if both sides feel I haven't done that it is my pleasure to affirm the point, and I affirm it.

"8. In order to avoid the binding effect of a release by reason of an alleged mutual mistake, such mistake must relate to a present and existing fact and not merely to matters of opinion."

I affirm that point.

"9. Whatever verdict you render must be based upon your honest and conscientious finding of the facts that have been prove' by the evidence presented from the witness stand and you must not guess in arriving at your verdict."

I affirm that point.

And this is No. 10:

"10. This is a legal proceeding and you must not permit either sympathy for the Plaintiff or prejudice against the Defendant to affect your verdict in any way."

And I also charge you further, that you must not let prejudice against the plaintiff or favoritism toward the defendant affect you in any way. In other words, no favoritism no prejudice toward either party. They are just parties to a lawsuit. If I thought that you wouldn't divest yourself of prejudice in this case I would be awfully discouraged, but I affirm that point.

MR. PRICE: I think Your Honor did cover No. 11.

THE COURT: All right.

(No. 11 having been withdrawn as above, was not read, but reads as follows:

"11. Even if you find that some negligence of the Defendant caused or contributed to the Plaintiff's injury, if you also find that some negligence on the part of the Plaintiff likewise contributed to his injury you must first find the value of the pecuniary loss suffered by the Plaintiff and then reduce that amount by the percentage of the Plaintiff's negligence causing or contributing to the accident and then render your verdict in such reduced amount. For example, if you should find that the railroad's negligence and the Plaintiff's negligence causing or contributing to the accident were equal, your verdict must be for one half of the amount

that you find the actual damages to be in accordance with the rules which I have given you.")

THE COURT: No. 12——

MR. RICHTER: We oppose these points as written, 12 and 13.

THE COURT: But 11 I understand is satisfactory?

MR. PRICE: That has been covered.

THE COURT: "Under the evidence in this case you will disregard all evidence as to Rule 103 of the Pennsylvania Railroad and Rule 103 of the Reading Railroad, except to the extent that such evidence may affect the credibility of the witnesses, as such rules have no bearing on or causal connection with the alleged accident."

I affirm that point.

"13. Under the evidence in this case you will disregard all evidence as to Rule 103a of the Pennsylvania Railroad and the corresponding rule of the Reading Railroad, except to the extent that such evidence may affect the credibility of the witnesses, as such rules have no bearing on or causal connection with the alleged accident."

I affirm that point, and give an exception to the plaintiff to 12 and 13.

"14. The charge of the Court on the question of the measure of damages does not indicate and should not be construed by you as an indication that damages are to be awarded, but such instructions are being given because the Court is required to charge you on all possibilities and all phases of the case which you may have to consider."

I tried to make that clear to you. Anything that I may have said to illustrate a point is not to be construed as trying to interfere with your prerogative. You are the ones, and the only ones, that will have the say in this case.

Now, is there anything more you would like me to say?

MR. PRICE: We object to the supplemental point for charge on behalf of the plaintiff.

THE COURT: The supplemental point?

MR. RICHTER: I will withdraw it, Your Honor, and that will end it.

THE COURT: Thank you very much; it was a touchy thing—all right. I would have had to do some nice fence walking with it.

MR. PRICE: Has the plaintiff any more objections?

MR. RICHTER: No.

MR. PRICE: May I take certain exceptions to Your Honor's charge?——

THE COURT: Yes.

MR. PRICE: I take exception, first, to the refusal of those points presented by the defendant which were refused, and for the qualification made by the Court of point No. 6, I think it was.

And I will also ask for an exception on Your Honor's emphasis on the plaintiff's testimony and that he put his hand on the Book, and Your Honor's failure to put similar emphasis on the fact that a great number of witnesses put their hand on the Book with equal solemnity.

THE COURT: That expression "putting their hand on the Book" is a figurative expression here,—they are all sworn by the Book,—all of the witnesses put their hand on the Book. The same binding oath was given to every witness and the same solemnity attached to each one, and in my judgment the same credibility,—the same honesty and integrity,—can be imputed to all the witnesses. I tried to point out that divergence of testimony doesn't indicate perjury, but Mr. Price wants to call attention to the fact that they all had the same solemn oath, which is correct.

MR. PRICE: That is correct.

If Your Honor please, I take exception to Your Honor's remarks about the engineer leaving his throttle.

THE COURT: Well, he wasn't at the throttle.

MR. PRICE: The regular engineer would not have left except that the pilot was in charge. My point is that that might be confusing.

THE COURT: No, we will get the straightened out right now. When he was testifying that the pilot engineer had to run the engine and that the regular engineer couldn't run the engine because he wasn't familiar with that territory, and he was not at the throttle, but he could have been there, —he wasn't negligent in his duty in not being there, and instead of sitting up there on his hands and doing nothing he helped the fireman fire. There is no criticism at all for him doing that; I think that is highly commendable on his part.

MR. PRICE: Thank you, that covers it. I thought there might be some confusion as to the engineers.

THE COURT: No, it was very commendable on the part of the regular engineer, and I was quite pleased with it.

MR. PRICE: The defendant excepts to that portion of Your Honor's charge where you said that if the plaintiff had stayed hanging on to the rear end of the tank that that might possibly have resulted in his death.

THE COURT: In his what?

MR. PRICE: Death.

THE COURT: Or he was jarred off?

MR. PRICE: I don't think there is any evidence that would justify that statement.

THE COURT: That is up to the jury. I do not know how much the locomotive and tender weigh, possibly fifty or sixty tons. But, it is up to the jury to say whether Mr.

Callen was justified in jumping off; if he had stayed on he might have been thrown under the wheels.

MR. PRICE: Exception.

THE COURT: Exception.

MR. PRICE: Your Honor, we take exception to that part of Your Honor's charge where you said that the engineer stood braced for the jar of the coupling.

THE COURT: That is what he said.

MR. PRICE: I ask for an exception,—I think not,—and I ask for an exception.

Then, the statement that the plaintiff didn't know he was seriously injured.

THE COURT: Didn't know what?

MR. PRICE: I ask for an exception to Your Honor's statement in the charge that the plaintiff didn't know he was seriously injured.

THE COURT: Yes——

MR. PRICE: I can't take shorthand and therefore I have to paraphrase Your Honor's statement.

THE COURT: You are doing very well.

MR. PRICE: But it was substantially to that effect, and I ask for an exception.

THE COURT: You object to it?

MR. PRICE: I object to it, because it assumes that the plaintiff was seriously injured, and that is purely a question for the jury. He might not have been injured at all as a result of this accident.

THE COURT: I certainly didn't intend to give the implication that you get from it. I am leaving this entirely up to the jury to say whether he was injured, whether partially, temporarily, or what. The question of whether he was injured in any way at all as a result of this incident is entirely for the jury. Can I make that any plainer?

The plaintiff claims now that he was seriously injured, and that is what I am trying to bring out, but that is entirely for you, members of the jury.

MR. PRICE: Exception.

And Your Honor will grant me an exception to that part of Your Honor's charge where you said that the plaintiff was taken to a chiropractor for X-rays, and he wasn't notified of the findings.

MR. RICHTER: Your Honor meant the X-ray doctor. You said the chiropractor in error. Your Honor might correct that,—you used the word chiropractor instead of the X-ray doctor.

THE COURT: No, it is the X-ray doctor.

MR. PRICE: You meant the X-ray?

THE COURT: Yes, I accept your correction, and I am glad you called my attention to it. It was the X-ray, when the plaintiff was taken over to the X-ray doctor.

MR. PRICE: That takes care of that.

And exception to Your Honor's statement that both sides agree they didn't have in mind any permanent injuries in the case.

THE COURT: That is up to the jury.

MR. PRICE: And exception to the statement that Your Honor can't imagine a responsible employer committing fraud by paying $250 for a permanent injury, or words to that effect. I haven't quoted Your Honor exactly, but I think that is sufficient to identify the portion of the charge to which I now refer.

THE COURT: Yes.

MR. PRICE: And exception to Your Honor's statement that the plaintiff agreed to take $250 for his claim or that part of the claim to which Your Honor was referring.

And exception to Your Honor's charge that if the railroad did know that the man was permanently injured and

paid $250, that the comment of the Court might be very different.

THE COURT: Yes.

MR. PRICE: I object to that implication.

And, Your Honor, with all due respect, I must ask for an exception on the general ground that the charge was unduly favorable to the plaintiff and emphasized the plaintiff's case and prejudicial to the defendant.

I ask Your Honor to charge a little further on the question of contributory negligence. There was nothing to indicate what might be contributory negligence in this case, and I ask for an exception.

THE COURT: Do you want me to give the Supreme Court's definition of negligence and contributory negligence?

MR. PRICE: No indeed.

THE COURT: If you will tell me what you would like me to charge maybe I can make it more explicit.

MR. PRICE: I can indicate what I have in mind very readily.

THE COURT: Yes; I can't cover everything or I would be here all day in this case, and wouldn't cover everything.

MR. PRICE: Your Honor will recall that Callen admitted that he violated the rul· of the company in scrambling down the back end of the engine. There was evidence that it was negligence to leave the dog house even before the engine came to a stop; and that is one of the factors of negligence which might be considered very seriously by the jury, and whether it contributed to this accident.

THE COURT: I will ask the jury to take as the Court's language what Mr. Price has stated.

There are many details in this testimony that either side could call to our recollection, but I can't cover them all; it would be ridiculous if I tried to, but this point Mr.

Price feels,—and I am inclined to agree with him,—that it ought to be called to your attention, and I will accept his statement as mine and give it to you in his language, and ask you to bear it in mind.

MR. PRICE: I didn't mean that that would cover everything, but that is by way of illustration.

THE COURT: All right.

MR. PRICE: I do not know whether all the members of this jury are new or not, but I wonder whether Your Honor would say that their verdict has to be unanimous,—that everyone must agree before any verdict is rendered. This is the first case they have tried, I think.

THE COURT: And are you going to have any figures as to his earnings?

MR. RICHTER: No, Your Honor,—they were all given orally.

THE COURT: Members of the jury: Mr. Price wants me to call your attention to the fact that your verdict must be unanimous, all twelve of you must agree.

No figures?

MR. RICHTER: No figures.

THE COURT: Then, you will recall that part of the testimony, members of the jury.

(Whereupon, at 11:57 o'clock A. M., the bailiffs are sworn to take charge of the jury, and the jury retires for deliberation, taking with them plaintiff's exhibits 2, 3, 4, and 6, and defendant's exhibits 1, 2, and 3 as per agreement of counsel.)

The plaintiff submitted the following supplemental point for charge and which was later withdrawn:

"The Learned Trial Judge is respectfully requested to charge the jury as follows:

The only remedy that a railroad employee injured in interstate commerce has is under the Federal Em-

ployers Liability Act. He cannot claim compensation under any state compensation act as this Federal remedy is an exclusive remedy. As this is his only 'day in court', what you will do will be determinative of his cause of action.

Respectfully submitted,

B. NATHANIEL RICHTER,
Attorney for Plaintiff."

The defendant submitted the following points for charge:

"1. Under the Federal Employers' Liability Act the Plaintiff has a right of action only if his damage was caused by some negligence of the railroad company, and, therefore, unless you find that the railroad company was negligent and that such negligence contributed to or caused the Plaintiff's damage, your verdict must be for the Defendant railroad company."

"2. Under the Federal Employers' Liability Act the Plaintiff has the burden of proving the Defendant's negligence by a fair preponderance of the evidence. If therefore you find that the weight of the evidence is against the Defendant's negligence, or if you find that the evidence on the subject of negligence is equally balanced, in either of those cases your verdict must be for the Defendant railroad company.

"3. If you find that the evidence in the case and the reasonable inferences to be drawn from the evidence lead with equal force to two or more causes for the accident, for only one of which the Defendant would be responsible, you may not speculate as to which one was the cause of the accident and your verdict must be for the defendant railroad company.

"4. If you believe that the Plaintiff was, on the date of the execution of the release, of rational mind and of sufficient intelligence to understand the written

release, and that he either read it or was given the opportunity to read it before signing it, and that he received the consideration therefor, then he cannot recover in the present action. (Rader v. Lehigh Valley R. R. Co. 26F2, 73 and Merwin v. New York N. H. & H. R. Co., 62 F2, 803.)"

"5. In order to void a release on the ground of mutual mistake of fact as to the injuries intended to be included in said release, such mistake must relate to an existing fact and not merely to the future result or progress of an existing and known injury."

"6. If you believe that at the time the Plaintiff executed the release he had been advised by his own doctor that he had not been cured and that further treatments would be required, in that event the Plaintiff was not misled by anything done by the Defendant and you must accordingly find that the release is binding and valid and your verdict must be for Defendant."

"7. If you believe that the execution of the release was based partly if not entirely upon the question of liability and not upon any representations as to the extent of the injury, the release is binding upon the Plaintiff and your verdict must be for Defendant."

"8. In order to avoid the binding effect of a release by reason of an alleged mutual mistake, such mistake must relate to a present and existing fact and not merely to matters of opinion."

"9. Whatever verdict you render must be based upon your honest and conscientious finding of the facts that have been proven by the evidence presented from the witness stand and you must not guess in arriving at your verdict."

"10. This is a legal proceeding and you must not permit either sympathy for the Plaintiff or prejudice against the Defendant to affect your verdict in any way."

"11. Even if you find that some negligence of the Defendant caused or contributed to the Plaintiff's injury, if you also find that some negligence on the part of the Plaintiff likewise contributed to his injury you must first find the value of the pecuniary loss suffered by the Plaintiff and then reduce that amount by the percentage of the Plaintiff's negligence causing or contributing to the accident and then render your verdict in such reduced amount. For example, if you should find that the railroad's negligence and the Plaintiff's negligence causing or contributing to the accident were equal, your verdict must be for one half of the amount that you find the actual damages to be in accordance with the rules which I have given you."

"12. Under the evidence in this case you will disregard all evidence as to Rule 103 of the Pennsylvania Railroad and Rule 103 of the Reading Railroad, except to the extent that such evidence may affect the credibility of the witnesses, as such rules have no bearing on or causal connection with the alleged accident."

"13. Under the evidence in this case you will disregard all evidence as to Rule 103a of the Pennsylvania Railroad and the corresponding rule of the Reading Railroad, except to the extent that such evidence may affect the credibility of the witnesses, as such rules have no bearing on or causal connection with the alleged accident."

"14. The charge of the Court on the question of the measure of damages does not indicate and should not be construed by you as an indication that damages are to be awarded, but such instructions are being given because the Court is required to charge you on all possibilities and all phases of the case which you may have to consider.

PHILIP PRICE,
Attorney for Defendant."

MR. PRICE: And it is also agreed by and between counsel for the plaintiff and counsel for the defendant that the verdict may be taken in the absence of counsel, but in the case of further instructions that counsel will be called.

(At 5:20 o'clock P. M., the jury returns to open court and renders its verdict, "For the plaintiff, and assess the damages at $25,240, of which the railroad is to be reimbursed with $250.00.")

THE COURT: Just a minute, I want to get the record right. Then, members of the jury, you make your net finding, $24,990?

THE FOREMAN: $24,990.

THE COURT: $24,990.00 for the plaintiff.

THE FOREMAN: Yes, sir.

THE COURT: And you want to call the Court's attention in the figure you have allowed the $250.00 already paid?

THE FOREMAN: Yes, sir.

THE JURORS: Yes, sir.

THE COURT: Then, your verdict is in the sum of $24,990.00 for the plaintiff,—that is your verdict?

THE JURORS: Yes, sir.

THE COURT: All right, let the verdict be recorded.

Members of the jury, I appreciate the attention you have given to this, and your verdict will be recorded.

(Trial Closed.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

H. A. B. SCHWARTZ,
Court Reporter.

Date: June 21, 1946.

MOTION FOR DIRECTED VERDICT UNDER RULE 50.

(Filed May 28, 1946.)

The learned Trial Judge is requested to charge the jury on behalf of the Defendant as follows:

"Under all the evidence your verdict must be for the Defendant,"

and in support of the above request the Defendant assigns the following reasons:

1. There is no evidence of any negligence on the part of the Defendant.

2. There is no evidence that any negligence on the part of the Defendant was the proximate cause of the Plaintiff's injury.

3. The evidence shows that the sole and proximate cause of any injury suffered by plaintiff was his own negligence.

4. The evidence establishes the fact that the Plaintiff voluntarily and without fraud or duress executed and for valuable consideration delivered to the Defendant a full release of any and all liability by reason of his alleged injuries.

5. The evidence establishes the fact that the execution of the release was not based on the extent of the alleged injuries alone but also and primarily upon the question of liability after full discussion and denial of liability by defendant.

6. The Plaintiff has failed to sustain the burden of proof with reference to proof of negligence.

/s/ PHILIP PRICE,
Attorney for Defendant.

JUDGMENT.

(Filed May 28, 1946.)

Before WELSH, *J.*

AND NOW, to wit, May 28th, 1946, in accordance with the verdict, it is ORDERED that Judgment be and hereby is entered in favor of Plaintiff, Rudy E. Callen and against the Defendant, Pennsylvania Railroad Company, in the sum of Twenty-four Thousand, Nine Hundred and Ninety and 00/100 ($24,990.00) Dollars, together with costs.

By THE COURT:

Attest: /s/ GILBERT W. LUDWIG,
Deputy Clerk.

DEFENDANT'S MOTION TO SET ASIDE VERDICT AND JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTION FOR DIRECTED VERDICT.

(Filed May 31, 1946.)

AND Now, to wit, this 31st day of May, 1946, the defendant moves the Court to set aside the verdict and the judgment entered thereon in accordance with defendant's motion for directed verdict presented to the Court at the close of the evidence.

/s/ PHILIP PRICE.
Attorney for Defendant.

DEFENDANT'S MOTION FOR NEW TRIAL.

(Filed June 6, 1946.)

And Now, to wit, this 6th day of June, 1946, the Defendant by its attorney, Philip Price, Esquire, moves the Court for a new trial of the above case and assigns therefor the following reason:

1. The verdict was against the evidence.

2. The verdict was against the weight of the evidence.

3. The verdict was against the law.

4. The verdict was excessive.

5. The Court erred in its charge to the jury with respect to the binding effect of the release.

6. The Court erred in its charge to the jury in the respects indicated by the exceptions taken by the Defendant at the trial.

7. The charge of the Court was unduly prejudicial to the Defendant and partial to the Plaintiff.

8. The Court erred in refusing to withdraw a juror upon Defendant's motion.

9. The Court erred in the comments to the jury during the course of the trial which were objected to by the Defendant.

10. The Court erred in the admission of testimony over the objection of the Defendant.

11. Defendant reserves the right to file additional reasons when the notes of testimony have been transcribed.

/s/ Philip Price,
Attorney for Defendant.

OPINION

Sur Motions to Set Aside Verdict and Judgment and For New Trial.

October 21, 1946.

WELSH, *J.*

In this action, which was brought under the Federal Employers' Liability Act, 45 U. S. C. A. 51, the jury returned its verdict in favor of the plaintiff in the amount of $24,990.00. Judgment was entered accordingly, and thereafter, the defendant filed two motions, the first to set aside the verdict and judgment in accordance with defendant's motion for a directed verdict which was presented to the Court at the close of the evidence, the second for a new trial.

On December 14, 1944, and for three years prior to that date, the plaintiff, Rudy E. Callen, was employed by the defendant, Pennsylvania R. R. Co., in the capacity of brakeman. On the aforementioned date, the plaintiff was head brakeman on a defendant-owned train which was travelling eastwardly from Toledo, Ohio, to the Conway Yards outside Pittsburgh, Pennsylvania. In addition to the plaintiff-brakeman the crew consisted of an engineer, fireman, pilot engineer, conductor and flagman. In attempting to ascend Tiro Hill near Vernon, Ohio, the train stalled because the engine was unable to haul its load of eighty (80) freight cars. The crew split the train in half and pulled the first section over Tiro Hill to the siding at Vernon, Ohio, leaving behind the flagman in charge of the remaining section of the train. After depositing the first section at Vernon, Ohio, the engine and tender headed backward and down Tiro Hill in the direction of the remaining section of the train which was standing at a public crossroad. On this return trip, the plaintiff rode in the "dog house" or shelter box located at the rear of the tender. As the engine approached within ten (10) car lengths of the cars still standing on the hill, the plaintiff descended from the shelter box to the end sill, walked across said end sill to the engi-

neer's side and took a position on the side stirrup. The plaintiff was facing in the direction that the train was moving.

The plaintiff testified that at that point the engine was moving approximately fifteen (15) miles per hour and that a "slow down" signal given by him went unheeded. When the engine was about two car lengths from the standing cars, a second "slow down" signal also went unheeded and the engine and tender were still proceeding at a fifteen (15) miles per hour rate. Finally, the plaintiff threw an emergency stop signal and as the tender approached the standing cars the evidence discloses that it had slowed down to six (6) miles per hour. The plaintiff, thinking that the impact which would result from the ensuing coupling operation between the engine and tender and the standing cars at that speed might jolt him off and cause him serious bodily harm, leaped from the moving engine and tender to avoid such impact and in doing so sustained the injuries complained of.

On the question of negligence, plaintiff's evidence shows that the speed of the engine and tender, when proceeding backward down Tiro Hill and approaching within a short distance of the standing cars, was six (6) miles per hour. The plaintiff knew that a safe coupling of the cars could not be effectuated at this rate of speed because the resulting impact would in all probability jolt him and throw him under the wheels of the train and injure him fatally. In an attempt to extricate himself from the hazardous situation in which he found himself, the plaintiff decided to leap from the moving engine and tender. Uncontradicted is the fact that a safe coupling operation should be made at a rate of speed not in excess of two (2) miles per hour. The physical aspects of the coupling operation would indicate that at the time of impact the speed was probably not in excess of that speed. But the plaintiff was afraid to wait and his long experience indicated that the safest course for him to pursue was to jump, which he did.

Contributory negligence while not a bar to an action brought under the Federal Employers' Liability Act must be considered in connection with the mitigation of damages. The question of contributory negligence is also a fact to be determined by the jury, and since there is sufficient evidence in the record to the effect that the plaintiff was charged with the duty of supervising the coupling operation and that he was justified in taking a position on the side stirrup in order that he would be able to properly discharge said duty, that question is foreclosed from further consideration here.

The defendant contends that the verdict of the jury in the amount of $24,990.00 was excessive. The rule is that the trial judge will not interfere with a jury's verdict unless the verdict was so grossly excessive that it shocks the conscience of the Court or it manifests it was the result of an improper motive. We are satisfied that the jury in the instant case was innocent of improper motives and that the amount of the verdict was reasonable under the particular facts and circumstances.

Undoubtedly, the plaintiff has suffered an extremely severe and excruciatingly painful injury to his back, not to the bone structure, but to the soft tissues, a tearing of the ligaments, muscles and the nerves and disorganization of the arrangement between the bones, as the spine sets into the pelvic cavity. A sacroiliac subluxation as exists in this case presents a probability of permanency and severity which therapeutic measures can only alleviate temporarily. In addition, the plaintiff has undergone a psychogenic change which means that his mental attitude has been altered.

The plaintiff has received medical treatment in varying degrees from the time of the accident to the present day, and although at one stage he showed improvement he subsequently suffered a relapse and at the present time his condition is as bad as it was at the time of the accident, if not worse.

The plaintiff has experienced pain and suffering and will experience the same for the rest of his life.

The plaintiff is unable to lift, bend or engage in heavy work. The disability of the plaintiff may be described as permanent and partial. In fact, the disability so far as his ablity to continue on with his original pursuit of brakeman is concerned may be more accurately characterized permanent. With regard to other types of employment which do not entail lifting, bending or other duties the plaintiff will be able to carry on to a limited extent. These other types of employment referred to must of necessity be in the nature of manual employment for the background of the plaintiff is such that he will have to rely on physical exertion to earn his livelihood in the future. The curtailed capacity of the plaintiff was strikingly illustrated when he managed to obtain employment at the Ambridge plant. In that employment the only physical effort that he expended was to bend to wrap a chain around an object so that a crane might lift it. The performance of this duty caused him a great deal of pain and discomfort.

The plaintiff is thirty-six (36) years of age and has a life expectancy of thirty (30) years. At the time of the accident he was earning between fifty and sixty (50-60) dollars per week and while he was employed at the Ambridge plant his earnings were thirty-five (35) dollars per week.

The plaintiff was unemployed between December, 1944, and October, 1945, as a result of which he lost in earnings approximately $2500.00. He incurred medical expenses which approximate $200.00 and he will incur continual medical expenses in the future.

In view of the injuries, the diminished earning capacity (with allowance for present worth or value), the pain and suffering, past, present and future, the actual "out of pocket expense" and future medical expenses and the additional factor that the purchasing power of the dollar today is extremely low, it is the opinion of this Court that there

are sufficient facts in the record to support the jury's verdict and the latter, therefore, was moderate and not excessive. There is one final fact that demonstrates most emphatically the good faith of the jury and the reasonableness of the amount of the verdict—the odd amount of the verdict. The jury returned its verdict in favor of the plaintiff in the amount of $25,240.00 and after crediting the defendant with the $250.00, the consideration contained in the release of February 14, 1945, the final sum was $24,990.00.

Finally, it is contended by the defendant that the $250.00 release entered into by the plaintiff and the defendant's claim agent on February 14, 1945, releasing and discharging the defendant from all claims and damages is valid and binding as a matter of law and that the plaintiff is bound thereby. The most that can be said for the defendant in this respect is that there is no evidence of fraud and that as a matter of fact the issue of fraud had not been raised by the pleadings. There is, however, substantial evidence in the record to warrant the jury's finding that the release in question was induced by a mutual mistake of the parties as to the nature and extent of the plaintiff's injuries. In support of the finding that the plaintiff was laboring under a misapprehension as to the nature and extent of his injuries, reference need only be made to one portion of the testimony. The plaintiff was asked:

"And what did he say about the job?"

The plaintiff answered:

"I was all right to go back to the job; there was nothing wrong with me. I got to thinking, maybe there wasn't, and I took for granted I was all right; A little sprain, and I would be all right, and I could get back within a week or so."

He was then asked:

"What influenced you in accepting this $250.00."

And he replied:

"The fact he said there was nothing wrong with me and I could go back to work."

It is clear from the above quoted portion of the testimony that the plaintiff executed the release in reliance upon the assertions of the claim agent to the effect that there wasn't anything wrong with him and that he would be able to return to work in a short time. The foregoing conclusion is not affected by the fact that the plaintiff knew that he had experienced pain from the time he sustained the injuries to the date of the execution of the release and that the pain was present at the time of the signing of said release. The fact remains that the plaintiff, Callen, did rely upon the statements of the claim agent and justifiably so. With regard to the claim agent, he too was under a misapprehension as to the nature and extent of the plaintiff's injuries because at the trial he admitted that at the time of the execution of the release he did not have in mind the type injury which was testified to in court. The law is clear that where the parties enter into a release agreement and there is present a mutual mistake of a material fact (in the instant case it can hardly be said that the mistake as to the nature and extent of the injuries is not material) the release may be set aside and avoided. Lion Oil Refining Company v. Albritton, 21 Fed. 2d 280; Montgomery Ward and Company v. Callahan, 127 Fed. 2d 122. In the instant case, the release was properly set aside because a mutual mistake of fact was proved.

There is an additional reason why the release should not operate as a bar to the plaintiff's claim. It is evident from the verdict that the jury found as a fact the existence of a mutual mistake of a material fact and such a finding should not be disturbed if there is sufficient evidence in the record to support it. A review of the record discloses that the jury correctly exercised its prerogative as the trier of the facts in this respect and the defendant is

precluded from setting up the release as a bar to the plaintiff's claim.

As we believe no substantial error was committed by the trial judge in his rulings and in his charge to the jury, we deem it unnecessary to discuss the other reasons assigned by the defendant.

In view of the discussion contained in the foregoing opinion the defendant's motion to set aside verdict and judgment and for a new trial are denied, and an order may be entered accordingly.

ORDER.

(Filed October 28, 1946.)

Before WELSH, *J.*

AND NOW, to wit: October 28th, 1946, in accordance with the opinion of the Court, it is ORDERED that Defendant's motions to set aside verdict and Judgment, and for new trial, be and the same are hereby denied.

By THE COURT:

Attest: /s/ GILBERT W. LUDWIG,
Deputy Clerk.

[fol. 313] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9263

RUDY E. CALLEN

vs.

PENNSYLVANIA RAILROAD COMPANY, Appellant

And afterwards, to wit, 8th day of April 1947 come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Herbert F. Goodrich, Honorable Gerald McLaughlin and Honorable Harry E. Kalodner, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 28th day of July, 1947 come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 314] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9263

RUDY E. CALLEN

vs.

PENNSYLVANIA RAILROAD COMPANY, Appellant

Appeal from the Judgment and Final Order of the District Court of the United States for the Eastern District of Pennsylvania

Argued April 8, 1947

Before Goodrich, McLaughlin and Kalodner, Circuit Judges

OPINION OF THE COURT—Filed July 28, 1947

By McLAUGHLIN, Circuit Judge:

This is an appeal from a plaintiff's judgment in a personal injury suit under the Federal Employer's Liability Act, 45 U. S. C. A. Section 51.

On December 14, 1944, plaintiff-appellee was a brakeman employed by defendant-appellant. In jumping from the stirrup of a tender then being pushed by an engine, and about to be coupled to some standing cars, appellee claimed to have hurt his back. He was apparently able to complete his work for that day but after he arrived home his back was sore. He "thought all the while it is just a little [fol. 315] strain." He did not go to work again until about five days later. On the first day of his return he was forced to leave work early as "it kept getting worse." He then saw a Dr. Sheets who gave him a back injection and taped him. Later "it started to get bad" and he received fifteen or sixteen treatments from Dr. Fair, a chiropractor. During that period he had "terrible" pain in his sacroiliac area.

On February 14, 1945, he went to see the appellant's claim agent, Veidt, at Toledo. He brought with him a report on his condition from the chiropractor. This described his injury as "Twisting of body producing nerve pressure and inflammation in sacro illiac and lower lumbar region of spine." The prognosis was "Leaves a weakness which is more readily increased and makes him more susceptible to recurrence." After appellee gave the agent a statement, the latter took him to an X-ray clinic where X-rays were taken of his back. Appellee received no report as to these, "Only what I gathered from Mr. Veidt." When appellee and Veidt returned to the latter's office, according to appellee, Veidt said to him, "You got a lot of gall coming in here, asking for anything like that and there is nothing wrong." Appellee accepted $250 from Veidt and signed a release. He said he was influenced in accepting that sum by "The fact that he [Veidt] said there was nothing wrong with me and I could go back to work." He later said as to Veidt, "I thought he knew what he was talking about." Veidt testified that he based his idea of settlement on the lack of negligence or liability, saying with reference to settlement that "I wasn't concerned with his injuries." He added to this, "Except by his own medical report. That is what I was basing it on. I was basing my settlement on the liability more than on the injury." He stated that at the time of the settlement, "I didn't know he had the injuries the doctors described in this court room." He also said, "I wasn't concerned with the injury; I was

concerned with the liability and I settled on the basis of no liability."

[fol. 316] Dr. Sheets examined appellee towards the latter part of December, 1944. He found appellee suffering from sacroiliac subluxation and strapped him. Appellee again saw this doctor in March, 1945, and continued visiting him until the last of June, 1945. During that time the doctor obtained a sacroiliac belt for him. The doctor next saw appellee in October, 1945, and treated him to the date of the trial, May 31, 1946. The doctor said Callen was permanently disabled, about "fifteen to twenty per cent below par" with some psychogenic change. The only other medical witness in the case, Dr. Jepson, also test-fying on behalf of the appellee, was of the opinion that the latter had "a chronic low back strain, with limited function of around fifteen per cent." The doctor refused to commit himself as to whether Callen's back condition was permanent.

Appellant's principal contention is that the Trial Judge did not properly present the release question to the jury. There was no allegation of fraud against the railroad with reference to the release which by its terms absolved the railroad from all claims of Callen arising out of the particular accident. Callen testified that he was influenced in executing it by claim agent Veidt's statement that there was nothing wrong with him. Veidt as a witness said that at the time the document was signed, he did not know Callen had the injuries the doctors described in the court room. There was thus in the trial some evidence of mutual mistake regarding Callen's injuries, ~~the all~~ important element in the settlement. That evidence in order to void the release, had to be clear, unequivocal, and convi-cing. Chicago & N. W. Ry. Co. vs. Wilcox, 8 Cir., 116 F. 913, 914; Restatement of Contracts, Sections 502, 511. Whether the testimony here considered fulfilled those conditions was for the jury to pass upon under the guidance of the Court's instructions.

In his charge the District Judge commented at some length upon the release. He first said, "both sides agree that that release was not in contemplation of any sort of permanent injury." Later referring to Veidt's settlement [fol. 317] authority being limited to $500, he said, "I think if it had been known that this man had these permanent in-

juries Mr. Veidt would not have handled the matter." The Court then stated:

"Now, I am going to consider that release as binding to the amount of $250.00, and if you find a verdict for the plaintiff you will deduct that from any amount you would otherwise give him. The $250.00 he got for expenses and medical bills and services that he obtained up to that time; and if you find that he is entitled to a verdict at your hands I will ask you to deduct that $250.00 from any amount you otherwise would award him, because that is what he agreed to take toward that particular phase of his claim, and of course he would not and does not ask, as I understand it to be excused from that,—he admits that he got it, and there it is.

"The release, as I have told the attorneys for both sides, I do not consider binding insofar as it applies to his permanent injuries, because the Pennsylvania Railroad certainly didn't know he was permanently injured, and if they did know he was permanently injured and settled for $250.00 the comment of the Court might be entirely different.

"Now, you heard the doctors' testimony as to his injuries. I am going to leave you to pass judgment upon how far this man is impaired, whether partially impaired, whether partially impaired permanently, or whether he is impaired in his earning capacity at all. I am going to leave that entirely to you."

Following the above, the Court charged Number 5 of appellant's points which reads:

"5. In order to avoid a release on the ground of mutual mistake of fact as to the injuries intended to be included in said release, such mistake must relate to an existing fact and not merely to the future result or progress of an existing and known injury."

Number 6 was charged as follows:

" '6. If you believe that at the time the Plaintiff executed the release he had been advised by his own [fol. 318] doctor that he had not been cured and that further treatments would be required, in that event the Plaintiff was not misled by anything done by the Defendant and you must accordingly find that the release

is binding and valid and your verdict must be for Defendant.'

"Members of the jury, I affirm that point with this explanation, if you believe that at the time the plaintiff executed the release he had been advised by his own doctor that he had not been cured and that he believed he had not been cured—I don't know what evidence there is, I will leave that entirely to you, as to what the doctors have advised this man at the time he consulted with Mr. Veidt, that he had not been cured. But, he did state he didn't know he was permanently injured, and Mr. Veidt said he didn't know he was permanently injured, and they both settled on the basis of loss of wages and expenses and because Mr. Veidt felt there was no liability and that it was just a local matter. With that explanation, I affirm that point. If he believed and he knew full well he was injured the way he is today and he made a settlement for $250.00, then he would be bound by it."

Numbers 7 and 8 were charged. These read:

"'7. If you believe that the execution of the release was based partly if not entirely upon the question of liability and not upon any representations as to the extent of the injury, the release is binding upon the plaintiff and your verdict must be for the defendant.

'8. In order to avoid the binding effect of a release by reason of an alleged mutual mistake, such mistake must relate to a present and existing fact and not merely to matters of opinion.'"

Prior to charging appellant's points above quoted, the District Judge had advised the jury that the release was not binding in so far as it applied to appellee's permanent injuries. This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries. Thereafter, in charging appellant's points, though the Judge made a conscientious effort to remedy the situation, he failed to tell the jury that clear [fol. 319] and convincing evidence of mutual mistake of a material fact was needed in order to set the release aside.

That type of instruction was especially important in view of the confusion which had been created over the status of the release. Had a point for charge covering this been among the fourteen submitted on behalf of the appellant, it probably would have solved the difficulty, but the failure to suggest such point does not excuse the omission from the charge of the law of that phase of the case which should have been charged of the Court's own motion.

Though the permanency of appellee's injuries was one of the controverted issues both in the pleadings and at the trial, the District Judge in his charge mistakenly advised the jury in the above noted instructions that appellee had been permanently injured and that this was conceded by the appellant. After so doing, the Court said to the jury, "I am going to leave you to pass judgment upon how far this man had been impaired, whether partially impaired, whether partially impaired permanently or whether he is impaired in his earning capacity at all. I am going to leave that entirely to you. * * * I am going to leave you to say in your experienced judgment just how far he has been impaired."

Again, while the Court obviously made a sincere attempt to present to the jury the real status of the permanent injury claim, we do not think that the rather vague language used actually eliminated the harm of the previous positive statements. The amount paid in settlement had been $250. The verdict was in the sum of $24,990. The wide disparity between the two figures may or may not be some indication that the jury did not understand that the Trial Judge meant to contradict what he had said at least three times in the same charge. In any event it does seem that the Court's final instruction regarding the injuries was hardly sufficient to fully counteract the unfair result of [fol. 320] the inadvertent misstatements of appellant's position in this respect.

We have examined the remaining two points urged by the appellant. We do not find any substantial error in connection with them.

The judgment of the District Court is reversed and the matter is remanded to the District Court for a new trial.

A true Copy: Teste.

——————, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 321] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9263

RUDY E. CALLEN

vs.

PENNSYLVANIA RAILROAD COMPANY, Appellant

Present: Goodrich, McLaughlin and Kalodner, Circuit Judges.

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed with costs and the matter is remanded to the District Court for a new trial.

By the Court: McLaughlin, Circuit Judge.

July 28, 1947.

Endorsements: Order Reversing Judgment, etc. Received & Filed July 28, 1947. William P. Rowland, Clerk.

[fol. 322] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9263

RUDY E. CALLEN

vs.

PENNSYLVANIA RAILROAD COMPANY, Appellant

Present: Goodrich, McLaughlin and Kalodner, Circuit Judges.

ORDER

And Now, to wit, this 6th day of August, 1947,

It Is Ordered that the printed opinion filed herein on July 28, 1947, be and the same is hereby amended as follows:

By striking out the words "the all" in the twelfth line, second paragraph, page 3 of the opinion and substituting therefor the word "an".

For the Court: McLaughlin, United States Circuit Judge.

Endorsements: Order, Amending Opinion of July 28, 1947. Received & Filed Aug. 6, 1947. William P. Rowland, Clerk.

[fol. 323] UNITED STATES OF AMERICA;
Eastern District of Pennsylvania,
Third Judicial Circuit, Set:

I, John P. Kelly, Deputy Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the Appendix to Appellant's Brief (as constituting portions of the record before the court at argument) and proceedings in this court in the case of Rudy E. Callen vs. Pennsylvania Railroad Company, Appellant (No. 9263), on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 7th day of August in the year of our Lord one thousand nine hundred and forty-seven, and of the Independence of the United States the one hundred and seventy-first.

John P. Kelly, Deputy Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 324] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 27, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

Term, 1947. No. 331

RUDY E. CALLEN,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 1945. No.

RUDY E. CALLEN,

Petitioner,

VS.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Rudy E. Callen, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on July 28, 1947.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania, dated October 21, 1946, is not reported, but may be found in the transcript of the record.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, 161 F. 2d—, dated July 28, 1947, has not yet been printed in the advance sheets, but may be found in the transcript of the record.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on July 28, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

The Circuit Court set aside a final judgment and granted a new trial on a pure question of law which, if erroneously decided by the Circuit Court, would nullify the new trial and entitle the petitioner here to reinstatement of the judgment obtained in the District Court. This Court in TILLER v. ATLANTIC COASTLINE R. CO., 323 U. S. 574, 65 S. Ct. 421 (1945), granted certiorari in that case in which the exact similar situation existed, where the Circuit Court granted a new trial and set aside a judgment obtained by the employee in the District Court on the ground that an erroneous proposition of law had been submitted to the jury. This Court thereupon held that the proposition of law as stated by the District Court was correct, set aside the grant of a

new trial by the Circuit Court, and reinstated the judgment entered by the District Court.

Certiorari has been held to be appropriate to review an interlocutory decree of a Circuit Court of Appeals where the question of law involved was deemed to be "novel and important" and the position of the petitioner was one which if correct rendered the decision of the Court below wholly void.

AMERICAN CONSTRUCTION CO. v. JACKSONVILLE T. & K. W. RY. CO., 148 U. S. 372 (37 L. Ed. 486).

See also:

SPILLER v. ATCHISON T. & S. F. RY. CO., 253 U. S. 117 (64 L. Ed. 810);

GEORGE A. FULLER CO. v. OTIS ELEVATOR CO., 245 U. S. 489 (62 L. Ed. 422);

U. S. v. GULF REFINING CO., 268 U. S. 542 (69 L. Ed. 1082).

QUESTIONS PRESENTED.

(1) Where, in cases under the Federal Employers' Liability Act, a railroad pleads a release obtained from an injured employee, is the burden of proof upon the railroad to establish its validity, or is the burden on the employee to establish fraud or mutual mistake of fact by clear, unequivocal and convincing evidence?

(2) Did not the Circuit Court of Appeals (3rd Cir.) err in setting aside a judgment obtained by a railroad employee under the Federal Employers' Liability Act, 45 U. S. C. A. 51 *et seq.*, solely on the ground that the trial judge committed error in failing to charge that the employee would be

bound by a nominal release obtained from him by his employer, unless he successfully carried the burden of proof that the release was obtained from him under a mutual mistake of fact, by evidence which was "clear, unequivocal and convincing," especially where the trial court was not asked so to charge, and no exception was taken to his failure so to charge?

CONSTITUTION AND STATUTES INVOLVED.

The Seventh Amendment to the Constitution of the United States which, in its pertinent parts, provides:

> "In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Federal Employers' Liability Act as amended (45 U. S. C. A., Sec. 51, *et seq.*), which provides in part:

> "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Sec. 5 of the Federal Employers' Liability Act (45 U. S. C. A. 55) provides in part:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Chapter, shall to that extent be void. * * *"

STATEMENT OF FACTS.

This is an action under the Federal Employers' Liability Act, 45 U. S. C. A. 51, resulting in a verdict of $24,990.00 for the petitioner. The defenses were that the accident was caused solely by the negligence of the petitioner and that the petitioner had executed a release for $250.00 for all his injuries and pecuniary losses.

The petitioner, Rudy E. Callen, was in the employ of the respondent as a brakeman on December 14, 1944, when he suffered a back injury. He was married and the father of three small children. Petitioner twisted his back when he jumped from the stirrup of a tender, which was being pushed by an engine, and was about to be coupled to some standing cars. Petitioner jumped because the engine was operating at too fast a speed to make the coupling operation safe (19a, 38a, 83a). Negligence was predicated upon that speed and upon the engineer's failure to observe and obey petitioner's signal to slow down (18a, 19a). As a result, petitioner was led to believe that unless he jumped, he might be jolted off by the impact from coupling at the excessive speed, and thereby be thrown under the wheels (19a). While respondent contested this claim of negligence at the trial, there appeared to be no denial on the appeal to the Circuit Court of Appeals (3rd Cir.) that this charge of negligence was sufficiently supported by the evidence.

Shortly after the injury, petitioner went once to his family physician, Dr. Sheets, who taped his back (22a). Thereafter, Callen went to a Dr. Fair, for a series of chiropractic

treatments, which, however, failed to end his pain (22a, 23a). Meanwhile, petitioner had contacted respondent's claim department and he was referred to respondent's claim agent, Veidt, in Toledo, Ohio (24a). At Veidt's request, petitioner took along a statement from the *chiropractor*. This statement was to the effect that petitioner was suffering from "nerve pressure and inflammation" in the lower part of his back and spine. In addition, it carried the rather ambiguous remark that the injury "leaves a weakness which is more readily increased and makes him more susceptible to recurrence." The only treatment mentioned in the statement was "chiropractic adjustments to remove pressure" (274a).

The claim adjuster, Veidt, took petitioner to a Toledo clinic for X-rays (26a). While they were being taken, Veidt waited in the doctor's office (247a). Thereafter, petitioner dressed, and then waited about half an hour for Veidt to rejoin him (138a). Thereupon they returned to Veidt's office (49a).

Although he did not tell Callen whether or not he (Veidt) had received any doctor's report on the X-ray, Veidt upbraided petitioner, telling him that he had a "lot of gall" to complain and that "there is nothing wrong" (26a). Thereupon, although he had pain in his back, because of economic pressure in that his wife was about to have a baby, and he had already lost approximately $500.00 in wages, petitioner agreed to sign a release for $250.00. He did this only in reliance on Veidt's assurance that "there was nothing wrong" and that "he could get back to the job" (27a). At the time, he had no legal counsel.

Veidt admitted that he did not know, when he settled the case, that petitioner was suffering the serious injuries which the doctors described at the trial, that he was not concerned with the injury, but "settled on the basis of no liability" (256a; see also 255a), and that, actually, he had not received any X-ray report at the time of settlement (247a).

After the release, petitioner returned to Dr. Sheets for treatments (30a), continuing up to the time of trial (37a).

He also consulted Dr. Paul N. Jepson, famed Philadelphia orthopaedic specialist (35a). According to Dr. Sheets, petitioner is permanently disabled (128a). Dr. Jepson was uncertain how long petitioner's "chronic" condition would continue (117a), but indicated that petitioner would never have "full one hundred per cent motion in his back—because men with chronic low back strain carry a certain percentage of limited motion, sometimes, throughout their life" (118a).

There was no medical testimony of any kind offered by the respondent to contradict the petitioner's proof that he was permanently disabled.

The respondent did not make any request at the trial that the trial judge charge the jury that the burden of proof in establishing a mutual mistake of fact was upon the petitioner, nor that the petitioner was bound to establish that fact by evidence which was "clear, unequivocal and convincing." It justified the release by asserting that it was based on an accident caused solely by the petitioner's own negligence. That issue was squarely presented to the jury which found against the railroad.

Respondent's motion for a directed verdict was refused and after the verdict for petitioner, respondent's motion for a new trial was denied.

The respondent appealed from the judgment entered in the United States District Court for the Eastern District of Pennsylvania to the Circuit Court of Appeals for the Third Circuit, which reversed the judgment and granted the respondent a new trial on the ground (not raised by the respondent) that it was error for the trial judge to fail to charge the jury that the employee bore the burden of proof of establishing a mutual mistake of fact in the execution of the release, by evidence which was "clear, unequivocal and convincing." The respondent had not requested the trial judge so to charge. It had taken no exception on his failure so to charge. It had not specifically assigned the failure so to charge as error. It had not questioned the failure so to charge in its statement of the questions in-

volved in the appeal to the Circuit Court.

This petition for certiorari to the Circuit Court of Appeals (3rd Cir.) follows, to review the action of that court in setting aside the petitioner's final judgment and granting a new trial on a pure question of law on which, if the court below erred, the petitioner would here be entitled to reinstatement of the judgment.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court erred:

1. In granting the respondent a new trial.

2. In failing to affirm the judgment entered in the United States District Court for the Eastern District of Pennsylvania in favor of the petitioner.

REASONS FOR GRANTING OF WRIT.

1. Petitioner's Constitutional guarantee by trial of jury was violated when a verdict in favor of plaintiff was set aside by the Circuit Court for an alleged omission in the trial Court's charge, which would have been erroneous if given, and, in any event, was not made the subject of a requested point for charge, or of an exception, and was not relied upon by the defendant in the appeal to the Circuit Court.

2. The decision of the United States Circuit Court of Appeals for the Third Circuit is in direct conflict with the

decision of the United States Circuit Court of Appeals for the Second Circuit in SCHEER v. ROCKNE MOTORS CORP., 68 F. 2d 942 (1934); STEELE v. ERIE R. CO., 54 F. 2d 688 (1931); and RICKETTS v. P. R. R., 153 F. 2d 757 (1946), more particularly, the concurring opinion of Frank, J.

3. GARRETT v. MOORE-McCORMACK CO., 317 U. S. 239, 63 S. Ct. 246 (1942), expressly held that the burden of proof, establishing the validity of a release for an employee in seamen's cases, was on the employer. In that case, at footnote 17, the Court implied, without deciding, that the same principle should be applied to railroad employees under the Federal Employers' Liability Act. That issue is now directly presented for the first time to this Court for decision.

4. The Court in error applied the local Pennsylvania rule on releases to cases under the Federal Employers' Liability Act which are controlled exclusively by Federal decisional law, and thus held contrary to CHESAPEAKE & O. R. CO. v. KUHN, 284 U. S. 44, 52 S. Ct. 47, 76 L. Ed. 157, and GARRETT v. MOORE-McCORMICK CO., 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239.

5. The decision here must be controlled by the Federal common law which has not yet decided this all important issue under the Federal Employers' Liability Act, U. S. A. v. STANDARD OIL CO. OF CAL. and IRA BOONE, 67 S. Ct. 1604 (1947).

CONCLUSION.

The writ should be granted.

Respectfully submitted,

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BRIEF.

ARGUMENT.

I.

THE CIRCUIT COURT ERRED IN REVERSING ON AN ISSUE NOT RAISED IN THE TRIAL COURT AND NOT ARISING ON THE RECORD.

The Circuit Court granted a new trial because the trial judge:

> "* * * failed to tell the jury that clear and convincing evidence of mutual mistake of a material fact was needed in order to set the release aside."

In other words, the position of the Circuit Court was that the trial Court failed to charge that plaintiff had the burden of proof to show mistake by clear and convincing evidence. The Circuit Court then added:

> "Had a point for charge covering this been among the fourteen submitted on behalf of the appellant, it probably would have solved the difficulty, but the failure to suggest such point does not excuse the omission from the charge of the law of that phase of the case which should have been charged of the Court's own omission."

This language of the Circuit Court itself makes it clear beyond peradventure that the defendant below never requested the trial Court to give the charge, omission of which caused the Circuit Court to set aside the verdict of the jury and the judgment in favor of the plaintiff. Defendant failed to ask for that omitted point, notwithstanding the trial judge, after passing upon the points requested by defendant,

pointedly asked, "Now, is there anything more you would like me to say" (293a). Nor was the alleged omission made the subject of an exception. Nor, indeed, was the failure to give that charge relied upon by the defendant itself, even on the appeal, as a ground for reversal.

Assuming, pro arguendo, that the point allegedly omitted would have been correct as a matter of law, it is axiomatic that issues or questions not raised in, or presented to, the trial Court will not be considered in a reviewing court. DE RODRIGUEZ v. VIVONI, 201 U. S. 371, 26 S. Ct. 475 (1906); BECKER STEEL CO. v. CUMMINGS, 296 U. S. 74, 56 S. Ct. 15 (1935), affirming C. C. A., 75 F. 2d 1005, affirming D. C., 10 F. Supp. 343; VIRTUE v. CREAMERY PCKGE. MFG. CO., 227 U. S. 8, 33 S. Ct. 202 (1913).

Error cannot be assigned for failure to give instructions that were not asked. SHUTTE v. THOMPSON, 82 U. S. 151, 15 Wall. 151 (1872); HINDS v. HINCHMAN-RENTON, 165 F. 339 (C. C. A. Colo., 1908); HULL CO. v. MARQUETTE CEMENT MFG. CO., 208 F. 260 (C. C. A. Neb., 1913); McKAY v. MONONGAHELA RY. CO., 44 F. 2d 150 (C. C. A. Pa., 1930); DEL. & H. R. CORP. v. COTTRELL, 69 F. 2d 195, cert. den. 292 U. S. 638, 54 S. Ct. 719 (C. C. A. Pa., 1934); WRATHER v. DEMPSTER MILL MFG. CO., 37 F. 2d 648 (C. C. A. Tex., 1930).

So, too, failure of a trial Court to charge with respect to a particular claim of the defendant is not reviewable unless the matter is called to the attention of the trial Court. CLEVELAND & WESTERN COAL CO. v. MAIN ISLAND CREEK COAL CO., 297 F. 60, cert. den. 265 U. S. 588, 44 S. Ct. 634 (C. C. A. Ohio, 1924). Likewise, it has been held in a Federal Employers' Liability case that in the absence of a request for a charge as to the effect even of as an important a matter as voluntary assumption of risk, such a question cannot arise on the record. SOUTHERN RY. v. GADD, 233 U. S. 572, 34 S. Ct. 696 (1914). Similiter as to failure to give instructions as to the statute of limitations, DEXTER v. HALL, 82 U. S. 9, 15 Wall. 9 (1872).

Indeed, it has long been settled that the failure to instruct on a particular point—*no matter how material*—cannot be assigned for error unless the trial judge's attention was called to it with a request for instructions. MUTUAL LIFE INS. CO. v. SNYDER, 93 U. S. 393, L. Ed. 887 (1876); HERMAN CHEMICAL CO. v. BURLINGTON INDUST. ALCOHOL CO., 9 F. 2d 289 (C. C. A. N. J., 1925); STATE AUTO. MUT. INS. CO. v. YORK, 104 F. 2d 730, cert. den. 60 S. Ct. 120. (C. C. A. N. C., 1939); KEYSTONE COAL & COKE CO. v. FEKETE, 232 F. 72, cert. den. 242 U. S. 18, 37 S. Ct. 18 (1916); OHMER v. ALLEN, 79 F. 2d 942 (C. C. A. Ohio, 1936). The principle of the above cases has been applied even where the complaining party supposes that the instructions are indefinite, ambiguous or not sufficiently comprehensive. In any event, in the absence of a request for further explicit instructions, reversal may not be had for such supposed error. Case of TWEED, 83 U. S. 504, 16 Wall. 504 (1872); ATLANTIC COASTLINE RY. CO. v. FORD, 287 U. S. 502, 53 S. Ct. 249 (1933); WASH. & G. R. CO. v. VARNELL, 98 U. S. 479, 25 L. Ed. 233 (1878). In short, even the possibility that an instruction might be misunderstood by a jury, is not ground for reversal where the matter is not called to the attention of the trial court. GRAHAM v. U. S., 231 U. S. 474, 34 S. Ct. 148 (1913).

And even where the trial Court overlooks giving a point that has been specifically requested, if the Court invited counsel to suggest any omissions, and none were suggested, a general exception to the refusal to charge as requested will not suffice to raise the error on appeal. P. R. R. v. MINDS, 250 U. S. 368, 39 S. Ct. 531 (1919). In that case, the Court said (at p. 375):

> "Parties may not rest content with the procedure of a trial, saving general exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial Court had its attention been seasonably called to the matter."

Since in the instant case, defendant failed to request the point suggested by the Circuit Court, even after being invited by the Court to advance further points, failed to take exception to the omission, and failed to rely upon that omission on appeal, the Circuit Court erred in reversing on that ground. Thereby, the Circuit Court deprived plaintiff of the fruits of his constitutionally guaranteed jury trial.

II.

THE POINT ALLEGEDLY OMITTED FROM THE CHARGE WOULD HAVE BEEN ERRONEOUS IF GIVEN.

The learned trial judge properly told the jury the following:

(a) whether the injuries were temporary or permanent, and the disability, if any, was partial or entire, were solely questions for the jury;

(b) neither party knew of or settled this case in contemplation of serious permanent injuries;

(c) the release, therefore, had no effect to bind the petitioner for such injuries *unless* he executed the release, not on the basis of the injuries and losses involved, but rather *despite* such injuries, and because his own conduct was the sole cause of the accident.

The Circuit Court conceded that there was adequate evidence of mistake to justify setting aside the release. It said: "There was thus in the trial some evidence of mutual mistake regarding Callen's injuries, an important element in the settlement." But it reversed the judgment below on the theory that the plaintiff's "evidence in order to void the release, had to be clear, unequivocal, and convincing." At the same time, the Circuit Court recognized the existence of the

jury issue and admitted that had the trial judge, in his charge, added those three magic adjectives as the standard and told the jury that the petitioner bore that burden of proof, there would have been no error. Furthermore, the Circuit Court acknowledged that a request *by the defendant* for such a charge would have avoided error.

It follows that, since admittedly there was adequate evidence of a mutual mistake of fact, if, as a matter of law, there is no such burden of proof upon the railroad employee, failure so to charge was not error and the Circuit Court's assigned reason for setting aside the judgment falls, so that the original judgment should be here reinstated.

Who then bears the burden in releases executed by employees in cases under the Federal Employers' Liability Act? The railroad or the employee? And by quantum of proof?

This question has never been directly decided by this Court. It is novel, it is most important, and the decision in *this* case will be of the greatest significance in assuring the prime purpose of the statute itself, i. e., proper and fair compensation to railroad employees for injuries sustained in interstate commerce, in accordance with the measure of damages set forth in the statute. This Court found the very same issue *in seamen's cases* to be of sufficient significance to grant certiorari in GARRETT v. MOORE-McCORMACK CO., 316 U. S. 239, 63 S. Ct. 246 (1942), indicating the law on releases as to both is comparable, without expressly deciding it and reserved the question in railroad cases for future decision. It is here, now, for the first time, directly presented to the Court.

Does not the rule enunciated for seamen in GARRETT v. MOORE-McCORMACK CO., supra, apply equally to railroad workers?

We are, of course, bound by Federal decisional law on this question. BAILEY v. CENTRAL VT. R. CO., 63 S. Ct. 1062, 319 U. S. 350, 87 L. Ed. 1444 (1943). We must look then for our authorities and our reasoning, in deciding this question, to the following:

A. The Federal common law "to be gathered from the same * * *" sources employed by Federal courts prior to the decision in ERIE R. CO. v. TOMPKINS, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); (L. Hand, J., in RICKETTS v. P. R. R., 153 F. 2d 757, 759.)

B. To the statute itself, creating the right of action.

C. To other Federal statutes creating similar rights for other classes of employees, as the Jones Act, 46 U. S. C. A. 688, and the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C. A., Sections 915 and 916.

A. The Federal common law and those sources employed by Federal courts prior to the decision in ERIE R. CO. v. TOMPKINS, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

The recent case of U. S. A. v. STANDARD OIL CO. OF CAL. and IRA BOONE, 67 S. Ct. 1604 (1947), held that there is a definite field of Federal common law. This exists, naturally, where suits are based on Federal statutes, on subjects about which the Federal courts alone must establish the substantive law.

In effect the law of releases, as decided under the GARRETT v. MOORE-McCORMACK CO. case, supra, was an enunciation of the Federal common law, as it applied to seamen. The Court took a viewpoint diametrically opposed to that expressed by the Pennsylvania Supreme Court as Pennsylvania common law and placed the burden of proof on the employer to justify employee releases.

What is the Federal common law on releases? This Court in the GARRETT case, supra, clearly indicated that cases under the Federal Employers' Liability Act (non-maritime tort actions) are comparable to seamen's suits. The cases cited in footnote 17 of that case all sustained judgments for the injured employee and held the releases properly set aside. None placed the burden of proof on the injured to invalidate the release, and none set up the severe and

strained standard of proof suggested by CHICAGO & N. W. R. CO. v. WILCOX, 116 F. 913, 914 (C. C. A. 8, 1902), upon which the Court below here relied.

There was some conflict between the various Federal courts as to the burden of proof on releases in ordinary tort actions, but none in Federal Employers' Liability Act cases until this decision. The Court below relied on the WILCOX case, supra, where by a *divided* court, it was held that, "* * * A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is *clear, unequivocal and convincing.*" (Emphasis supplied.)

That was a simple tort case, not involving a master-servant relationship and was not an action under a Federal statute, written as was the Federal Employers' Liability Act to give the widest possible protection to injured railroad employees. LILLY v. GRAND TRUNK WESTERN R. CO., 317 U. S. 481, 485, 63 S. Ct. 347 (1943); GREAT NORTHERN R. CO. v. DONALDSON, 246 U. S. 121, 38 S. Ct. 230 (1917).

The WILCOX case is more revered for its antiquity than its authoritativeness or scholariness. In employee suits against railroads prior to the Federal Employers' Liability Act and since the passage of that Act, most courts have not followed the decision of the WILCOX case. Some have expressly preferred the dissenting opinion of Judge Thayer in that case. Even the few who seemingly cited the WILCOX case with approval managed to set aside the releases by distinguishing it or by holding the evidence adequate to meet the WILCOX test. LION OIL REF. CO. v. ALBRITTON, 21 F. 2d 280 (1927).

Thus, in STEELE v. ERIE R. R., 54 F. 2d 688, affirmed 54 F. 2d 690 (C. C. A. 2, 1931), a Federal Employers' Liability Act case, the WILCOX rule was rejected.

The case of TEXAS & PAC. RY. CO. v. DASHIELL, 198 U. S. 521, 25 S. Ct. 521 (1905), is on "all fours" with the instant case.

Even in an ordinary tort suit, SCHEER v. ROCKNE MO-

TORS CORP., 68 F. 2d 942, 945 (C. C. A. 2, 1934), Judge L. Hand said, "These assurances were much more positive than that before the Court in Chicago & N. W. Ry. Co. v. Wilcox, 116 F. 913 (C. C. A. 8). *The dicta of the majority we have already refused to follow, preferring Judge Thayer's dissent.*" (Emphasis supplied.)

Perhaps no more learned and exhaustive review of the whole subject can be obtained any place than in the opinion of Judge Frank in RICKETTS v. P. R. R., 153 F. 2d 757 (C. C. A. 2, 1946). He analyzed and reviewed the works of all the writers on the subject, including Williston, Wigmore and the Restatements of Contracts and Restitution, the various real and fictional approaches to the problem, the values that inured in all of them, and the practical aspects of each. He recognized the fact that railroad employees in this phase of their employment are individuals at the mercy of the railroad company, who need protection from hard and unconscionable bargain-driving by the employer. This was in *pari materia* with the underlying social and economic values expressed in the celebrated opinion of Judge Story in HARDEN v. GORDON, Federal Cases No. 8047, at pages 480, 485.

Judge Frank concluded that the burden of establishing the validity of a release should be on the railroad and not at all on the employee and drew the appropriate analogy to seamen's cases.

He said the following, at page 768:

> "* * * *As already noted, the Supreme Court recently gave a broad hint that the admiralty doctrine is not as exceptional as is sometimes supposed;* see Garrett v. Moore-McCormack Co., 317 U. S. 239, 248, 63 S. Ct. 246, 87 L. Ed. 239; note 17. For reasons previously indicated, I think we should take that hint. It seems to me that the time has come to give up the elaboration of distinctions found in the judicial opinions relieving non-admiralty employees of their releases. *I believe that the courts should now say forthrightly that the ju-*

diciary regards the ordinary employee as one who needs and will receive the special protection of the courts when, for a small consideration, he has given a release after an injury. As Mr. Justice Holmes often urged, when an important issue of social policy arises, it should be candidly; not evasively, articulated. *In other contexts, the courts have openly acknowledged that the economic inequality between the ordinary employer and the ordinary indvidual employee usually means the absence of 'free bargaining.' I think the courts should do so in these employee release cases. And the federal courts, I think, should so hold in respect to liability pursuant to the Federal Employers' Liability Act. I think, therefore, that we should treat the plaintiff here as we would if he were a seaman."* (Emphasis supplied.)

Today, in most enlightened jurisdictions, there need not even be a *mutual* mistake of fact as to the injury. It is sufficient if there is a bona fide unilateral mistake as to the nature and extent of the injury. In the very recent case of SULLIVAN v. ELGIN J. & E. R. CO., 73 N. E. 2d 632 (Ill., 1947), it was held that the release of an employer from future liability for past injuries sustained by the employee is void unless based upon valuable consideration and that the release, in that case, executed by the employee without knowledge as to the seriousness of his injury, would be set aside, whether or not the employer was aware at the time that the employee had suffered serious brain injury, as a mistake of fact need not be mutual.

B. The Federal Employers' Liability Act seemingly would place the burden on the employer to sustain a release.

The Federal Employers' Liability Act itself is an act written for the purpose of giving protection, long needed, to railroad employees injured in interstate commerce. That Act must be liberally interpreted. LILLY v. GRAND

TRUNK WESTERN R. CO., supra, and GREAT NORTHERN R. CO. v. DONALDSON, supra.

Section 5 of the Act reads as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereon on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, Sec. 5, 35 Stat. 66."

The prior experience in states where the legislatures had passed Employers' Liability statutes for railroad employees had been one of numerous and devious devices to avoid the statutes. See DUNCAN v. THOMPSON, 315 U. S. 1, 6, 62 S. Ct. 422 (1942). These devices actually deprived the employees in many instances of all the protection intended by the state employee acts. Congress in 1908 amended the original Act of 1906 in such manner as to make the present protective paragraph, Section 5, all-comprehensive so that every kind of contract or agreement would be held void which had the effect of depriving the employee of full and adequate remuneration for injuries compensable by the other paragraphs of the statute.

All activities pertaining to injuries under this Act must be screened through Section 5. Thus, the employee was held entitled to the benefits of the Act where he was hired by an alleged independent contractor to do railroad work (ERIE R. CO. v. MARGUE, 23 F. 2d 665 [C. C. A. 6, 1928]); or executed an agreement not to sue until he had refunded $600.00 advanced as living expenses (DUNCAN v. THOMPSON, supra); or had executed an agreement not to sue in

the district in which the suit was actually filed (SHERMAN v. PERE MARQUETTE R. R., 62 F. S. 590 [D. C. Ill., 1945]). All of the attempts at restrictions on the right to proceed with an action under the Federal Employers' Liability Act in these instances were held invalid. Furthermore, in the DUNCAN case, supra, it was held that Section 5 of the Act applied, notwithstanding the fact that the alleged agreement was entered into after the injury had occurred, the Court holding that there was no basis for distinguishing, as some courts had previously done, between agreements which were executed prior to the injury and those which were executed after the injury.

Can there be any device that more definitely is intended to, and does, enable a railroad to escape its responsibility under this statute, than a nominal release, the amount of which admittedly could not possibly have been meant to compensate for the actual injuries involved? Must not then those who seek by any means, including releases, to prevent action under the Act meet the test of Section 5? Is not that the expressed Congressional intention? We respectfully submit that Congress wrote this section as broadly as possible in order to prevent any device, *including releases*, however ingeniously conceived or explained, from stultifying the broad purposes of this humanitarian legislation.

C. Congress has indicated a similar intention to place the onus of sustaining a release on the employer in other industries.

Congress has already legislated on seamen's releases in regard to wages, and requires the execution of such releases in the presence of a Shipping Commissioner and even then "on good cause" any court having jurisdiction may set aside the release and take such action as justice shall require. 46 U. S. C. A., Sec. 597.

Indeed, even as to longshoremen whose conditions of employment are even more comparable to railroad employees,

Congress wrote into Sections 915 and 916 of the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C. A., strict requirements as to releases which, if in the slightest deviated from, rendered the releases void.

Even in Pennsylvania, where the petitioner here was hired, in Workmen's Compensation matters, agreements for compensation are ineffective until approved by the Pennsylvania Workmen's Compensation Board: Act of 1915, P. L. 736, Sec. 409, amended 1939, P. L. 520, 77 P. S. 733.

What then of nominal releases? Here a jury assessed the value of the case at over $25,000.00. The Company obtained a release of $250.00, or 1% of what twelve intelligent citizens of the community, sitting as jurors, assessed its true value. A learned, experienced and humane trial judge refused to cut that verdict. He believed the amount of the verdict just and fair. His decision therein was final and not subject to review. SCOTT v. BALTIMORE & O. R., 151 F. 2d 61 (C. C. A. 3, 1945).

Should not the burden of sustaining this release be on its proponent? The wise and bitter denunciation, expressed by Judge Frank in the last paragraph of his concurring opinion in the RICKETTS case, supra, of the railroad there involved, which is the same railroad here involved, where it there attempted to escape a $7500.00 liability by a payment of $750.00, may be here repeated tenfold with profit. He said, at page 770:

> "One need not be highly imaginative or unduly cynical to surmise that the Pennsylvania Railroad, in seeking here to be rid of a liability of $7,500 to this employee for a payment of $750, is not too strongly motivated by a philanthropic regard for its other employees."

III. GENERAL DISCUSSION.

Some passing criticism was leveled below at the trial judge for his comment as to the permanency of the injuries. He did not rule as a matter of law that the petitioner had permanent injuries. He repeatedly left to the jury the question of whether there were any injuries at all, whether partial or permanent. What is more, the respondent offered no medical testimony to contradict that offered by the petitioner. Four times the learned trial judge expressly left the extent, if any, of the injuries to the jury. Thus, the record is as follows:

> "Now, you heard the doctor's testimony as to his injuries. I am going to leave you to pass judgment upon how far this man is impaired, whether partially impaired, whether partially impaired permanently, or whether he is impaired in his earning capacity at all. I am going to leave that entirely to you. * * * I am going to leave you to say in your experienced judgment just how far he has been impaired" (page 282a).

Again (at 289a), he said:

> "I don't know what evidence there is, I will leave that entirely to you, as to what the doctors have advised this man at the time he consulted with Mr. Veidt, that he had not been cured. * * * If he believed and he knew full well he was injured the way he is today and he made a settlement for $250.00, then he would be bound by it."

What is more, on having his attention directed to the same question by counsel for respondent, the Court said, for the third time, at page 295a, the following:

"THE COURT: I certainly didn't intend to give the implication that you get from it. I am leaving this entirely up to the jury to say whether he was injured, whether partially, temporarily, or what. The question of whether he was injured in any way at all as a result of this accident is entirely for the jury. Can I make that any plainer? The plaintiff claims now that he was seriously injured, and that is what I am trying to bring out, but that is entirely for you, members of the jury."

Then once more (at 296a), the Court repeated that whether the parties had permanent injuries in mind was "up to the jury."

Further criticism was made by the Circuit Court of the Charge:

"The release * * * I do not consider binding insofar as it applies to his permanent injuries, because the Pennsylvania Railroad certainly didn't know he was permanently injured, and if they did know he was permanently injured and settled for $250.00 the comment of the Court might be entirely different."

This was absolutely correct as far as it went and at the point rendered. It is exactly the point raised in TEXAS PAC. RY. CO. v. DASHIELL, supra, where the Court also held as a matter of law that the release was not binding. Here, admittedly, the claim agent did not know at the time of the execution of the release that the petitioner suffered the injury complained of at the trial (255a, 256a). Admittedly, he did not settle the case on those injuries (255a, 256a). His defense of the release was that he settled the case without regard to the injuries at all and on the theory of no liability (255a, 256a). He paid only a part of the lost wages as an expression of the railroad's paternalistic benevolence. The petitioner said he settled, not on the basis of the present injuries, but in reliance upon the claim agent's

report that he had no injuries at all and could return to work (27a).

Neither side claimed that the case was settled on the basis of a permanent injury because no one knew he had it. Therefore, the Charge as to permanent injury was absolutely correct. The railroad's contention that the injury was not the issue, but that there was no liability was fairly presented to the jury by the affirmance of defendant's request for charge No. 7, which read:

> "If you believe that the execution of the release was based partly if not entirely upon the question of liability and not upon any representations as to the extent of the injury, the release is binding upon the plaintiff and your verdict must be for the defendant."

And, further, the Court affirmed defendant's request for charge No. 6 and made the following comment

> "If you believe that at the time the Plaintiff executed the release he had been advised by his own doctor that he had not been cured and that further treatments would be required, in that event the Plaintiff was not misled by anything done by the Defendant and you must accordingly find that the release is binding and valid and your verdict must be for Defendant.
>
> Members of the jury, I affirm that point with this explanation, if you believe that at the time the plaintiff executed the release he had been advised by his own doctor that he had not been cured and that he believed he had not been cured—I don't know what evidence there is, I will leave that entirely to you, as to what the doctors have advised this man at the time he consulted with Mr. Veidt, that he had not been cured. But, he did state he didn't know he was permanently injured, and Mr. Veidt said he didn't know he was permanently injured, and they both settled on the basis of loss of wages and expenses and because Mr. Veidt felt there

was no liability and that it was just a local matter. * * *"

At the time of the execution of this release, the railroad either knew this employee had these injuries or it did not know that he had these injuries. If it did not know that he had these injuries, it was obviously a mistake of fact and the release should be set aside. If it did know that he had these injuries, but told him that he did not have them, then it was guilty of gross fraud and the release should be set aside. The Court then properly said, at page 282a,

"* * * and if they did know he was permanently injured and settled for $250.00, the comment of the Court might be entirely different."

The comment explains itself.

CONCLUSION.

The Circuit Court in its opinion specifically admitted that had the trial judge charged that the employee bore the burden of proof of mutual mistake of fact by clear, unequivocal, and convincing evidence, there would have been no error, and that the verdict would have to be sustained. This raises a pure question of law. If the Circuit Court was in error in this regard, then the judgment must be reinstated. Even if we assume, *pro arguendo*, that the trial judge was in error in not so charging, was it reversible error to fail so to charge in the absence of a request for such charge, especially where, admittedly, there was evidence produced by the employee of a quality sufficient to meet even that burden of proof and the trial judge had asked if defendant wished further instructions (293a)? What is more, could the Circuit Court, of its own motion, consider a question of law raised for the first time at a point much beyond the time allowed by parts (a) and (d) of Rule 59 of the Federal Rules of Civil Procedure?

The question the Circuit Court decided the case on was never argued before it. The basic ground relied upon by the railroad was summarized in the railroad's own brief at page 10. One can readily see that it never even considered this alleged error. Thus, the brief reads:

> "Accordingly, the inquiry is directed *solely* to the question of whether or not there was evidence of a mutual mistake of fact and whether or not the trial judge erred in removing this question from the jury's consideration." (Emphasis supplied.)

Compare MARSHALL'S U. S. AUTO SUPPLY, INC. v. CASHMAN, 111 F. 2d 140, 142 (C. C. A. 10), cert. den. 311 U. S. 677 (1940), point 9 of syllabus; JOHNSON v. JOSEPH SCHLITZ'S BREWERY CO., 33 F. S. 176, 182 (E. D. Tenn., 1940); and FREID v. McGRATH, 133 F. 2d 350 (C. C. A. D. C., 1942).

We submit that the problem here involved is one of the gravest importance to railroad employees throughout the United States. After the execution of a nominal release, seemingly trivial injuries often prove serious and permanently disabling. Individual employees of meager education, with a limited knowledge of the law or not at all, are "squared off" against trained claim agents. The failure to place the burden in the proper place in this class of cases will undoubtedly result, as it has many times over in the past, in great suffering and misery in thousands of American railroad households where the breadwinner has been the subject of an outrageous release, such as here extracted from this employee under the weight of economic pressure. The loss of but a few weeks' wages in the average workingman's home places the employee under such pressure that he becomes an easy victim for the small, but tempting amount of cash offered by a claim agent who assures him that his injury is trivial and temporary.

Congress has shown its intention by this Act to protect the employee. We believe this to be the only reasonable

interpretation that should be made of the Act and the only effectual manner in which it can be done is by placing the burden where it belongs by reasons of justice and humaneness,—on the employer.

In this case the Court will here write a new chapter of Federal common law. The doctrine followed by the Court below is part of the school of thought that championed *laissez-faire* and *caveat emptor* in the 18th Century. Today the most conservative and reactionary of economic thinkers do not, at least publicly, espouse such thinking. It is certainly alien when applied to liberal and humanitarian legislation such as the Federal Employers' Liability Act.

Respectfully submitted,

JOHN H. HOFFMAN,
B. NATHANIEL RICHTER,
RICHTER, LORD & FARAGE.

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IN THE

Supreme Court of the United States

No. 331.

October Term, 1947.

RUDY E. CALLEN,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY
(Defendant-Appellant in the Court Below),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States.

No. 331.

October Term, 1947.

RUDY E. CALLEN,
Petitioner,

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PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (R. 306a) is not reported and the opinion of the Circuit Court of Appeals for the Third Circuit (R. 313) is reported in 162 Fed. 2d 832.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

QUESTION PRESENTED.

Whether the Circuit Court of Appeals erred in granting a new trial on the ground that the trial Court had committed reversible error in its instructions to the jury by (a) withdrawing from the jury the question whether a release given by the petitioner to respondent was intended by the parties to cover all claims arising out of the alleged injury and (b) in instructing the jury that there was no dispute about the permanency of the alleged injury despite the fact that this was a controverted issue of fact.

STATUTE INVOLVED.

No statutes are involved in the issues presented by the Circuit Court's decision in the instant case, which decision raises only common law questions concerning releases and the granting of a new trial because of errors in the trial court's charge.

STATEMENT.

Petitioner brought a suit under the Federal Employers' Liability Act to recover for an injury to his back alleged to have been received on December 14, 1944. The complaint alleged that the injury was incurred when the petitioner was forced to jump from an engine to the ground as a result of the negligence of the respondent (R. 4a-6a).[1]

At the trial petitioner testified that he had twisted his back when he had jumped from a tender which was about to make a coupling with standing cars and was running so fast that he thought the coupling operation unsafe (R. 19a).

In a statement given to the respondent's claim agent prior to the settlement and compromise of the claim, the petitioner stated that while engaged in a switching operation he jumped off a tender and his left foot may have landed on some ice, but that he did not know what made him slip (R. 81a).

In the same statement the petitioner stated that the engine was moving at a "moderately fast walking pace" and was moving slower than many engines from which he had jumped (R. 79a, 80a).

---

[1] Respondent offered evidence that the petitioner, although regularly employed as a brakeman, did not work for the respondent on December 14, 1944 (R. 146a, 206a, 237a). There was also evidence that the petitioner advised a conductor employed by the respondent a few days after the date of the alleged accident that he had not worked on December 12th or 14th because he was shoveling snow to get his car out of the garage and that he had hurt his back throwing a derail (R. 147a).

At the trial respondent showed that the coupling operation was effected at a speed of less than two miles per hour and this testimony was in part corroborated by the petitioner, who acknowledged that no damage resulted to the equipment (R. 19a, 83a, 154a, 193a, 219a, 224a). Petitioner's own expert witness testified that coupling at a speed greater than a mile and a half per hour was likely to damage the equipment (R. 94a).

Respondent pleaded a release of all claims arising from the injury, executed by the petitioner for a payment of $250. Petitioner testified that on February 14, 1945, he had executed a full release of all claims for injuries sustained in the accident but gave as his excuse for doing so that the respondent's claim agent had said there was nothing wrong with him and that he could go back to work (R. 27a). He testified that he had done this although his back had pained him severely during the period that he was receiving chiropractic treatment (R. 23a) which was the two month period from the date of the alleged accident to the time when he executed the release. He further testified that at the very time when he executed the release his back pained him so that he could hardly sit on a chair (R. 26a) and that a report (Defendant's Exhibit 3, R. 274a) by one of his own doctors, dated February 13, 1944 (the day before the execution of the release) and procured by the petitioner himself, showed that he was suffering from "nerve pressure and inflammation in sacro illiac and lower lumbar region of the spine." Petitioner's doctor's report further indicated that the petitioner had not been discharged at the time of the execution of the release, and that the injury "leaves a weakness which is more readily increased and makes him more susceptible to recurrence." Petitioner also testified that he had read and understood the release and intended to waive any further claim against the respondent (R. 54a, 55a).

Respondent's evidence indicated that the agreement for the release was made because petitioner's version of

the alleged accident, given to the respondent's claim agent at the time of the settlement, showed no negligence or liability on the part of the respondent and that the amount paid in settlement was determined accordingly (R. 248a, 251a, 252a, 253a, 256a, 257a).

The pleadings raised the issue whether the petitioner's injuries were permanent (R. 4a-8a). The respondent presented no medical evidence at the trial, and petitioner called two doctors. One of the doctors had examined the petitioner before the execution of the release. This doctor testified that the petitioner's injuries were permanent but the testimony of this doctor showed that his initial examination of the petitioner disclosed the same injuries that were described in a report which the petitioner had obtained from another doctor and had furnished to the respondent the day before the release was executed (R. 124a, 125a, 128a; Defendant's Exhibit 3, R. 274a). The other doctor called by the petitioner had not examined the petitioner until after the execution of the release. He had also diagnosed the petitioner as suffering from chronic low back strain, but he testified that he could not say whether the condition was permanent (R. 115a, 117a).

On the question of the validity and scope of the release the trial judge instructed the jury as follows (R. 281a):

> "Anyhow, they settled to the extent of $250.00, and the release has been offered in evidence and admitted, and both sides agree that that release was not in contemplation of any sort of permanent injury."
>
> "Now, members of the jury, you cannot agree to something you don't know anything about and didn't intend to cover. I want to make this statement, and I hope that the defendant will not object to it, because I can't imagine that a responsible and reputable employer, whether individual or corporate, would knowingly,—knowingly,—commit a fraud on an employee. I think if it had been known that this man had these

permanent injuries Mr. Veidt would not have handled the matter; it would probably have gone to Chicago where Mr. Callen said he was sent when he couldn't settle for $500.00. Therefore that release was given and taken, and Mr. Callen received $250.00.

"Now, I am going to consider that release as binding to the amount of $250.00, and if you find a verdict for the plaintiff you will deduct that from any amount you would otherwise give him. The $250.00 he got for expenses and medical bills and services that he obtained up to that time; and if you find that he is entitled to a verdict at your hands I will ask you to deduct that $250.00 from any amount you otherwise would award him, because that is what he agreed to take toward that particular phase of his claim, and of course he would not and does not ask, as I understand it to be excused from that,—he admits that he got it, and there it is.

"The release, as I have told the attorneys for both sides, I do not consider binding insofar as it applies to his permanent injuries, because the Pennsylvania Railroad certainly didn't know he was permanently injured, and if they did know he was permanently injured and settled for $250.00 the comment of the Court might be entirely different." (R. 281a-282a.)

The statement that "both sides agree that the release was not in contemplation of any sort of permanent injury" was incorrect. At the trial it was respondent's contention that the release was intended to cover all injuries suffered by the petitioner.

The words "if it had been known that this man had these permanent injuries", and the words "The release • • • I do not consider binding insofar as it applies to his permanent injuries" assumed that petitioner was permanently injured and in effect withdrew the question of

whether his injuries were, in fact, permanent from the consideration of the jury.

Respondent requested a number of instructions concerning the validity and effect of the release (R. 299a-301a). Some of these requested charges were read to the jury by the trial judge despite the fact that they were clearly inconsistent with that part of the charge which had removed the question of the validity and effect of the release from the jury's consideration (R. 288a-290a). Point No. 6 in the instructions submitted by the respondent related directly to the effect and validity of the release. This instruction was read to the jury by the trial judge with qualifying language that indicated to the jury that it should not regard the release as covering the permanent injuries which the Court's charge assumed existed[2] (R. 289a).

Respondent's motion for a directed verdict (R. 303a) was denied and the jury returned a verdict for the petitioner for $24,990.00. Thereafter respondent duly filed its

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[2] In his qualification of this requested charge the trial judge said, speaking of the plaintiff: "But, he did state he didn't know he was permanently injured, and Mr. Veidt said he didn't know he was permanently injured, and they both settled on the basis of loss of wages and expenses and because Mr. Veidt felt there was no liability and that it was just a local matter" (R. 289a). Veidt, who was respondent's claim agent, did not testify that at the time of the execution of the release "he didn't know he (petitioner) was permanently injured." What Veidt testified was that when the release was executed he did not know that the petitioner was suffering from the injuries that petitioner's witnesses had described during the trial of the case (R. 256a). This was not an admission that the injuries were permanent.

The respondent excepted to the Court's assumption that the petitioner's injuries were permanent and that this was not known at the time of the release so that the release could not be construed as covering those injuries (R. 295a, 296a). Respondent also excepted to the Court's qualification of the respondent's requested instruction No. 6 (R. 293a).

motion for a new trial (R. 305a). Respondent's motion was refused and an appeal to the Circuit Court followed. Respondent raised the issue of the instructions concerning the release in its statement of points on which it intended to rely in the Circuit Court and this was argued at length both in the briefs and at the oral argument in the Circuit Court (Appellant's brief below, pp. 1, 6-16). The question of the errors in the charge concerning the permanency of plaintiff's injuries was also argued extensively in the briefs and at the bar of the Circuit Court (Appellant's brief below, pp. 1, 16-17).

In its opinion the Circuit Court of Appeals, after quoting that portion of the judge's charge with respect to the validity and effect of the release, which has been set forth at pages 4 and 5, *supra*, reviewed the other instructions that the trial court had given to the jury and then said:

> "Prior to charging appellant's points above quoted, the District Judge had advised the jury that the release was not binding insofar as it applied to appellee's permanent injuries. This was palpable error under the facts relating to the release, and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries." (R. 317.)

The Circuit Court of Appeals also said:

> "Though the permanency of appellee's injuries was one of the controverted issues both in the pleadings and at the trial, the District Judge in his charge mistakenly advised the jury in the above noted instructions that appellee had been permanently injured and that this was conceded by the appellant." (R. 318.)

The Circuit Court of Appeals held that in these respects the instructions of the District Court were erroneous and reversed the judgment and remanded the case for a new trial.

ARGUMENT.

I. Certiorari Should Be Denied Because the Order Involved Is Interlocutory and Does Not Involve Questions of Peculiar Gravity or General Importance.

This Court has said that its power under Section 240 of the Judicial Code to review an interlocutory order by the issuance of a writ of certiorari should be "exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Company v. Wolf Brothers*, 240 U. S. 251, 258 (1916); *Denver v. New York Trust Company*, 229 U. S. 123, 133 (1913); *American Construction Company v. Jacksonville T. & K. W. Ry. Co.*, 148 U. S. 372, 384 (1893).

In the case at bar the Circuit Court of Appeals ordered a new trial on the grounds that the District Court's instructions to the jury were incorrect in two respects: First, the instructions assumed that both petitioner and respondent agreed that petitioner's injuries were permanent when in fact this was a controverted issue of fact in the case; and Second, The District Court in effect instructed the jury that at the time the release was executed neither the respondent nor the petitioner intended that the release should cover the permanent injuries which the District Court assumed that the petitioner had suffered. Thus the Circuit Court of Appeals viewed the District Court's instructions as withdrawing from the jury two controverted issues of fact. Whether these two issues of fact should have been decided by the jury and not by the District Judge is the only question properly raised by the petition.

The proposition that it was for the jury and not the District Judge to decide whether the petitioner's injuries were in fact permanent and whether at the time the release was executed the petitioner and respondent intended the release to cover all of the injuries that the petitioner had suffered, is so clearly correct that no citation of authority

or argument should be necessary to support it. The decision of the Court of Appeals applying this principle of law to the instructions of the District Court does not raise any grave question of general importance that requires or justifies decision by this Court. The petitioner seems tacitly to concede this point because it seeks to justify its petition by reference to a question that was not decided by the Circuit Court of Appeals and that is not raised by the present record. (See pages 10-11, *infra*).

The decisions cited by the petitioner to justify the issuance of the writ do not relate to situations comparable to the case at bar. Thus *Spiller v. A. T. & S. F. Ry.*, 253 U. S. 117 (1920), involved important questions with respect to the statutory power of the Interstate Commerce Commission to investigate claims for reparation and with respect to the procedure that the Commission should follow in investigating such claims. In *Tiller v. Atlantic Coast Line R. R. Co.*, 323 U. S. 574 (1945), the question presented was whether the failure of a carrier to have a light in the rear of an engine was as a matter of law sufficient evidence of negligence to raise an issue for the jury. Certiorari was granted "because of the importance of questions involved relating to the administration and enforcement of the Federal Employers Liability Act" (323 U. S. at p. 576).[3] Similarly in *American Construction Co. v. Jacksonville T. & K. W. Ry.*, 148 U. S. 372 (1893), the question raised was whether Section 3 of the Judiciary Act of 1891 prevented a judge who had decided a case in a lower Court from participating in the hearing of the case in the Circuit Court of Appeals. This Court described that question as "a novel and important one, deeply affecting the administration of justice in the Circuit Court of Appeals" (148 U. S. 372, 387).

---

[3] In this connection it should be noted that in the *Tiller* case there had already been two trials in the District Court. See *Tiller v. Atl. Coast Line R. R.*, 318 U. S. 54 (1943).

II. The Petition Does Not Raise Any Issue With Respect to the Burden of Proof; the Circuit Court of Appeals Did Not Reverse the Judgment Below on the Ground That It Was the Burden of the Plaintiff to Prove That the Release Had Been Executed by Mistake.

Much of the argument in the petition assumes that the Circuit Court reversed the judgment of the District Court and ordered a new trial on the ground that it was the burden of the petitioner to show by clear and convincing evidence that the release had been executed by mistake. This was not the basis of the opinion of the Circuit Court of Appeals. That Court held only that the instructions were erroneous because they, in effect, withdrew from the jury the question whether the petitioner's injuries were permanent and the question whether when the parties executed the release they intended the release to cover all of the injuries suffered by petitioner. In fact the respondent did not ask the trial court to instruct the jury that it was the burden of the plaintiff to prove that the release was executed by mistake. The respondent itself had offered testimony at the trial designed to show that the release had not been executed under mistake of fact. Apart from any question of the burden of proof the respondent was entitled to have this evidence considered by the jury.

So far as the petitioner's argument is directed to the proposition that it is the burden of the employer to sustain a release the argument is irrelevant. If it were appropriate to do so, the respondent would contend that in a case arising under the Federal Employers Liability Act, it is the burden of the employee to prove that a release is invalid because executed under a mistake of fact and not the burden of the employer to sustain the validity of the release.[4] The re-

[4] See *Restatement of Contracts*, Sections 502, 504, 511, *Chicago & Northwestern Ry. Co. v. Wilcox*, 116 Fed. 913 (CCA 8th, 1902), *The Lion Oil Co. v. Albritton*, 21 Fed. 2d 280 (CCA 8th, 1927), *Atlantic Greyhound Lines v. Metz*, 70 Fed. 2d 166, 168 (CCA 4th, 1934).

spondent, however, does not now press this contention because the issue is not raised by the case in its present posture.

In any event the District Court's error in withdrawing from the jury the question whether the petitioner's injuries were permanent was an error that had nothing to do with the burden of proof. That error, considered alone and without reference to the release, justifies the action of the Circuit Court of Appeals in reversing the judgment.

III. There Is No Conflict Between the Decision of the Circuit Court of Appeals and the Decisions of Circuit Courts of Appeals in Other Circuits.

No other Circuit Court of Appeals has held that in a suit under the Federal Employers Liability Act the District Court is entitled to withdraw from the jury the question whether the alleged injuries are permanent or the question whether the parties intended that a release should cover all of the injuries actually incurred. The decisions cited by the petitioner all relate to other issues. For example, in *Steele v. Erie R. R. Co.*, 54 Fed. 2d 688 (W. D. N. Y., 1931), affirmed *per curiam* 54 Fed. 2d 690 (CCA 2d, 1931), and *Scheer v. Rockne Motor Corporation*, 68 Fed. 2d 942 (CCA 2d, 1934), the question for decision was whether on the facts the mistake alleged was a mistake of fact or merely a mistake in prophecy or opinion and therefore insufficient to invalidate the release. In *Ricketts v. P. R. R. Co.*, 153 Fed. 2d 757 (CCA 2d, 1946), the Circuit Court of Appeals for the Second Circuit affirmed a judgment for the plaintiff on the ground that a release pleaded by way of defense had been executed by an attorney who was not authorized to release a claim for personal injuries. The opinion of the Circuit Court of Appeals in that case assumed that the jury had found that the attorney had no authority to release the claim for personal injuries. There is no suggestion in the opinion of Circuit Judge L. Hand or in the concurring

opinion of Circuit Judge Frank that the District Judge was entitled to withdraw from the jury either that question of fact or any other question of fact relating to the validity of the release.

IV. There Is No Merit in Petitioner's Contention That the Circuit Court Reversed on an Issue Not Raised in the Trial Court and Not Arising on the Record.

The petitioner asserts that the Circuit Court of Appeals reversed on an issue that was not raised in the trial court and that does not arise on the record. This argument rests on the petitioner's misconception of the grounds of the decision of the Circuit Court of Appeals. That Court did not hold that the District Court had committed error by failing to instruct the jury that it was the burden of the petitioner to prove that the release was executed by mistake. On the contrary, the Court of Appeals held that the charge of the District Court was erroneous because it withdrew from the jury issues of fact that it was for the jury and not for the District Court to decide.

It is true, as petitioner asserts, that respondent did not request the District Court to instruct the jury that it was the burden of the petitioner to prove that the release was invalidated by mistake. But the omission to request that charge is not significant because the case did not turn either in the District Court or in the Circuit Court of Appeals on any question relating to the burden of proof. It was not the failure of the District Court to charge the jury with respect to the burden of proof, but rather those portions of the District Court's instruction which in effect charged the jury that the petitioner's injuries were permanent and that both the respondent and the petitioner did not intend the release to cover all of the injuries actually suffered, that was reversible error. Respondent duly excepted to this portion of the charge and consequently was entitled to raise the question on appeal. Respondent's motion for a new

trial again assigned as error the Court's instruction with respect to the effect of the release (R. 305a). The same question was raised in respondent's statement of points on which it intended to rely on appeal and the propriety of the portions of the charge that related to the release was argued in the respondent's brief in the Court below.

CONCLUSION.

The respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

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IN THE

Supreme Court of the United States

No. 331.

October Term, 1947.

RUDY E. CALLEN,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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IN THE

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No. 331, October Term, 1947.

RUDY E. CALLEN,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (R. 306) is not reported. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 313) is reported in 162 Fed. 2d 832.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

QUESTIONS PRESENTED.

(1) Whether the Circuit Court of Appeals erred in granting a new trial on the ground that the Trial Court had committed reversible error in its instructions to the jury by (a) withdrawing from the jury the question whether a release given by the petitioner to respondent was intended by the parties to cover all claims arising out of the alleged injury and (b) in instructing the jury that there was no

dispute about the permanency of the alleged injury despite the fact that this was a controverted issue of fact.

(2) Whether the Circuit Court of Appeals should not have granted a new trial on the further grounds that (a) the Trial Court's charge was unduly prejudicial to the respondent and unduly favorable to the petitioner and (b) the Trial Court erred in its refusal to withdraw a juror after it had injected into the case the question of what passengers on a passenger train might think of an operating practice, which was a controversial issue not raised by the pleadings or evidence.

STATEMENT OF THE CASE.

Petitioner brought a suit under the Federal Employers' Liability Act to recover for an injury to his back alleged to have been received on December 14, 1944. The complaint alleged that the injury was incurred when the petitioner was forced to jump from an engine to the ground as a result of the negligence of the respondent (R. 4a-6a).

At the trial, petitioner testified that he had twisted his back on December 14, 1944 when he had jumped from a tender which was about to make a coupling with standing cars and was moving so fast that he thought the coupling operation unsafe (R. 19a).

However, respondent offered evidence that petitioner did not work for respondent on December 14, 1944 (R. 146a, 206a, 237a), that petitioner advised a conductor employed by respondent, a few days after December 14, 1944, that he had not worked on December 12th or 14th because he was shoveling snow to get his car out of the garage, and that he had told his conductor that he hurt his back "throwing the derail" (R. 147a).

It was shown that, in a statement given to the respondent's claim agent prior to the settlement and compromise of the claim, the petitioner stated that while engaged in a switching operation he jumped off a tender and his left

foot may have landed on some ice, but that he did not know what made him slip (R. 81a). In the same statement, the petitioner stated that the engine was moving at a "moderately fast walking pace" and was moving slower than many engines from which he had jumped (R. 79a, 80a).

At the trial, respondent showed that the coupling operation was effected at a speed of less than two miles per hour and this testimony was in part corroborated by the petitioner, who acknowledged that no damage resulted to the equipment (R. 19a, 83a, 154a, 193a, 219a, 224a). Petitioner's own expert witness testified that coupling at a speed greater than a mile and a half per hour was likely to damage the equipment (R. 94a).

Respondent pleaded a release of all claims arising from the injury, executed by the petitioner for a payment of $250. Petitioner testified that on February 14, 1945 he had executed this full release of all claims for injuries sustained in the accident but gave as his excuse for doing so that the respondent's claim agent had said there was nothing wrong with him and that he could go back to work (R. 27a). He testified that he had done this although his back had pained him severely during the period that he was receiving chiropractic treatment (R. 23a) which was the two month period from the date of the alleged accident to the time when he executed the release. He further testified that at the very time when he executed the release his back pained him so that he could hardly sit on a chair (R. 26a) and that he had procured and brought with him to the settlement a report (Defendant's Exhibit 3, R. 259a, 274a) by one of his own doctors dated February 13, 1944 (the day before the execution of the release) showing that he was suffering from "nerve pressure and inflammation in sacro illiac and lower lumbar region of the spine." Petitioner's doctor's report further indicated that the petitioner had not been discharged at the time of the execution of the release and that the injury "leaves a weakness which is more readily increased and makes him more susceptible to

recurrence." Petitioner also testified that he had read and understood the release and intended to waive any further claim against the respondent (R. 54a, 55a).

Respondent's evidence indicated that the agreement for the release was made because even the petitioner's version of the alleged accident, given to the respondent's claim agent at the time of the settlement, showed no negligence or liability on the part of the respondent and that the amount paid in settlement was determined accordingly (R. 248a, 251a, 253a, 256a, 257a).

The pleadings raised the issue whether the petitioner's injuries were permanent (R. 4a-8a). At the trial, petitioner called two doctors. One, Dr. Sheets, petitioner's family physician (R. 128a), treated him both before and after the date of the release (R. 124a, 126a). On his first examination, before the release was executed, Dr. Sheets found a large amount of spasticity of the muscle in the sacroiliac region, petitioner was given tests "to determine the condition of the sacroiliac subluxation," his ligaments were found to be torn, and petitioner was taped and given a narcotic for his pain (R. 124a, 125a). Thus Dr. Sheets' initial examination showed the same injuries as those described by the report (Defendant's Exhibit 3, R. 259a, 274a) which petitioner later obtained from Dr. Fair and furnished to the respondent at the time the release was executed. Dr. Sheets' later examinations, after the release was executed, showed the same conditions that he had found at the time of the first examination (R. 126a-128a, 130a). The other doctor, Dr. Jepson, saw petitioner after the execution of the release (R. 115a, 116a). His diagnosis was chronic low back strain, the same condition that had been described by Dr. Sheets and by Dr. Fair's report, but he testified that he could not say whether or not the condition was permanent (R. 116a, 117a). Respondent presented no medical evidence. A chart or a diagram analysis of the testimony and evidence concerning plaintiff's condition, both before and

after the date of execution of the release, is set forth below at page 15.

On the question of the validity and scope of the release, the Trial Judge charged the jury that the release was not binding on the petitioner for and did not cover permanent injuries, so that the jury should merely subtract the consideration for the release ($250) from their verdict if they should find for the petitioner (R. 281a, 282a). The Trial Judge also assumed in his charge that petitioner was suffering from permanent injuries (R. 281a, 282a), although this was one of the controverted issues, as to which petitioner's own doctors were in disagreement. Respondent's points for charge requested a number of instructions to the jury concerning the validity and effect of the release (R. 299a, 300a), and some of these were read to the jury by the Trial Judge (R. 288a-290a) despite their inconsistency with the portions of the charge which had removed the question of the validity and effect of the release from the jury's consideration (R. 281a, 282a). However, the court qualified the sixth point submitted by the respondent, which was the point most closely related to the issues and evidence in the case concerning the release, the qualification indicating that the jury should not regard the release as covering the permanent injuries which the court's charge assumed existed (R. 289a). Respondent duly excepted to this qualification and to the court's assumption that petitioner's injuries were permanent (R. 293a, 295a, 296a).

During the trial, the court refused to withdraw a juror at respondent's request, after the court had commented concerning whether or not passengers in a train would consider it a safe practice for an engine to back up against traffic without a brakeman riding on the rear step of the tender of the engine (R. 165a, 166a, 167a). The movement in which petitioner claimed to have received his injury was a movement of a freight engine, and there was no evidence that any passengers or passenger trains were in the least

involved, so that the question of passenger safety was not an issue in the case. In addition, respondent excepted to the charge as being unduly favorable to the petitioner, as emphasizing the petitioner's case and as being prejudicial to the respondent, and took a number of specific exceptions to parts of the charge which were objectionable in this respect. (R. 293a, 295a, 296a, 297a). The objectionable portions of the charge are discussed fully below, at pages 32 to 39.

Respondent's motion for a directed verdict (R. 303a) was denied and the jury returned a verdict for the petitioner in the sum of $24,990.00. Thereafter, respondent duly filed its motion for a new trial (R. 305a). Respondent's motion was refused and an appeal to the Circuit Court followed. Respondent raised the issue of the instructions concerning the release in its statement of points on which it intended to rely in the Circuit Court and this was argued at length both in the briefs and at the oral argument in the Circuit Court (Appellant's brief below, pp. 1, 6-16). The question of the errors in the charge concerning the permanency of petitioner's injuries was also argued extensively in the briefs and at the argument in the Circuit Court (Appellant's brief below, pp. 1, 16-17). In addition, respondent urged that a new trial should be granted because the charge was unduly prejudicial to the respondent and unduly favorable to the petitioner, and because of the court's refusal to withdraw a juror at respondent's request (Appellant's brief below, pp. 1, 17-26).

The Circuit Court of Appeals reversed the judgment of the District Court and directed a new trial because of the errors committed by the Trial Judge in his charge concerning the release and concerning the permanence of the injuries (R. 315, 317, 318), all of which were so confusing as to deprive respondent of a fair determination of the factual issues. The Circuit Court stated that it did not find substantial error as to the remaining points urged before it by the respondent (R. 318).

ARGUMENT.

Summary.

(1) The Circuit Court properly granted a new trial because the Trial Judge's charge erroneously removed from the jury's consideration the question of whether or not the release was executed under mutual mistake as to the nature of petitioner's injury. Although there was some evidence of mutual mistake in the execution of the release, there was also substantial evidence to show that, at the time the release was executed, petitioner had full knowledge of the nature and extent of his injury, which was the same injury complained of at the trial. Thus there was an issue of fact to be determined by the jury under proper instructions from the Trial Court. Not only did the Trial Court remove this question from the jury's consideration, but it failed to instruct the jury that, under the controlling federal decisions, clear, unequivocal, and convincing evidence of mistake is necessary to avoid a release. The rule in seamen's cases concerning the burden of proof for avoidance of a release is not applicable to cases under the Federal Employers' Liability Act. Section 5 of the Federal Employers' Liability Act has no bearing on bona fide settlements of claims for personal injuries arising under the statute (pp. 9-23, *infra*).

(2) The Circuit Court properly granted a new trial because the Trial Judge, in his charge, improperly assumed that petitioner's injuries were permanent. The permanence of the injuries was one of the substantial issues in the case and was not admitted by the respondent. Petitioner's own medical testimony was in disagreement as to whether or not the injuries were permanent so that any assumption that the injuries were permanent was improper and this question should have been left to the jury (pp. 24-27, *infra*).

(3) The respondent duly raised, both at the trial and on appeal, the errors in the Trial Court's charge. The re-

spondent had requested a number of points for charge predicated on the proposition that the jury should decide whether or not the release was executed under a mutual mistake of fact. The Trial Judge's charge improperly removed this issue from the jury's consideration by instructing the jury that the release, despite its terminology, was not binding as to permanent injuries. Since respondent's position had already been made clear in its requested points for charge, no further steps were necessary to preserve the question of the propriety of this portion of the charge for appeal. The Trial Judge's charge assumed that the injuries involved were permanent, although this was a controverted issue under the pleadings and evidence. Respondent duly excepted to this assumption in the charge. Both the failure of the Trial Court to submit the issue of mistake concerning the release and the erroneous assumption of the permanency of the injuries were raised by respondent in its motion for new trial and on appeal, so that these matters were properly before the Circuit Court as a basis for the grant of a new trial. Even if these points had not been duly raised at the trial and on appeal, the errors in the charge were fundamental, so that the Circuit Court had the power to grant a new trial because of them (pp. 27-31, *infra*).

(4) A new trial should have been granted because the charge of the Trial Court, in numerous respects, was unduly prejudicial to the respondent. The charge tended to excite sympathy for the petitioner and prejudice against the respondent by reference to the respondent's prosperity and to the hazardous nature of petitioner's occupation, by allusions to fraud on the part of respondent, and by emphasis on petitioner's testimony and virtual disregard of the testimony offered on behalf of the respondent. A new trial should also have been granted because the Trial Court refused to withdraw a juror after it had injected into the case a controversial issue concerning passenger safety, which was not, in any way, involved in the instant case (pp. 32-39, *infra*).

I. The Circuit Court Properly Granted a New Trial Because the Trial Judge Erroneously Charged That the Release Given by Petitioner to Respondent Was Not Binding.

The Trial Judge, in the portion of his charge dealing with the defense of the release, in effect gave the jury binding instructions that the release was not effective and that the jury should merely deduct the $250.00 paid to petitioner by respondent from any amount which they might award petitioner. Thus the Trial Judge stated (R. 281a, 282a):

> "Anyhow, they settled to the extent of $250.00 and the release has been offered in evidence and admitted, *and both sides agree that the release was not in contemplation of any sort of permanent injury.*
>
> * * *
>
> *"Now, I am going to consider that release as binding to the amount of $250.00, and if you find a verdict for the plaintiff you will deduct that from any amount you would otherwise give him. The $250.00 he got for expenses and medical bills and services that he obtained up to that time;* and if you find that he is entitled to a verdict at your hands *I will ask you to deduct that $250.00 from any amount you otherwise would award him, because that is what he agreed to take toward that particular phase of his claim,* and of course he would not and does not ask, as I understand it, to be excused from that,—he admits that he got it, and there it is.
>
> *"The release,* as I have told the attorneys for both sides, *I do not consider binding insofar as it applies to his permanent injuries,* because the Pennsylvania Railroad certainly didn't know he was permanently injured. . . ." (Emphasis supplied.)

In so charging the jury the entire question of what the release was intended to cover and whether or not the release was executed under mutual mistake of fact was removed

from their consideration. The Circuit Court commented on this portion of the charge as follows (R. 317):

> "Prior to charging appellant's points above quoted, the District Judge had advised the jury that the release was not binding in so far as it applied to appellee's permanent injuries. This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries."

Thus the failure to submit this issue to the jury was one of the principal grounds for the grant of a new trial. This is separate and distinct from the question of who bore the burden of proof on this issue. The grant of a new trial was not based on error as to the burden of proof in instructions submitting the question to the jury, but was based on the fact that the Trial Court did not even submit the question to the jury, regardless of who had the burden of proof. Thus much of the argument in petitioner's brief, concerning the question of burden of proof, is not truly pertinent to the case. Careful examination of the opinion of the Circuit Court fails to reveal any discussion of the question of burden of proof concerning the release transaction. The Circuit Court merely said, in its opinion, that clear, unequivocal, and convincing evidence is necessary to void a release, and that it was for the jury to determine whether these conditions had been fulfilled (R. 315, 317). This, in effect, was merely a statement as to the *quantum* of proof, not as to the burden of proof. It is submitted that the Circuit Court's views, on this point, were correct and that, had the issue been left to the jury, it should have been submitted on such instructions.

It is undisputed that, since the instant case arose under the Federal Employers' Liability Act, the question of whether or not the release given by the petitioner to the respondent was effective is governed by Federal Law. See *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (1942); *Ricketts v. P. R. R. Co.*, 153 F. 2d 757 (C. C. A. 2d, 1946).

Petitioner urges that the Circuit Court applied the Pennsylvania rule concerning releases rather than federal decisional law (Petitioner's brief, p. 9), but an examination of the court's opinion makes it completely clear that the court was applying Federal Law. The Circuit Court cited only Federal cases and the Restatement of Contracts (R. 315) and it was conceded both by petitioner and respondent, in the argument before the Circuit Court, that the Federal Law was controlling (Appellant's brief below, p. 7).

The Federal Law concerning the grounds for avoiding a release is clear. As was said in **Chicago & N. W. Ry. v. Wilcox, 116 F. 913, 914 (C. C. A. 8th, 1902)**:

> "The burden is always upon the assailant of the contract to establish the vice which he alleges induced it, and a bare preponderance of evidence will not sustain the burden. *A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is clear, unequivocal, and convincing.*" (Emphasis supplied.)

The rule of the Wilcox case was expressly affirmed in **Lion Oil Refining Co. v. Albritton, 21 F. 2d 280, 282 (C. C. A. 8th, 1927)**. Similarly, in **Atlantic Greyhound Lines v. Metz, 70 F. 2d 166, 168 (C. C. A. 4th, 1934)**, the court, even in permitting the avoidance of a release, said:

> "The evidence *clearly* shows that, at the time of the execution of the release, both plaintiff and the claim agent were entirely ignorant of the serious abdominal injuries which plaintiff had sustained . . ." (Emphasis supplied.)

The law concerning avoidance of a release for mutual mistake of fact is summarized in the *Restatement of Contracts*, Section 502, as follows:

> ". . . where parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is

> voidable by either party if enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be . . ."

Under the principles outlined in the *Restatement*, which correspond with those enunciated in the Federal decisions, a contract (or release) can be avoided only if (a) both parties are mistaken regarding a fact, and (b) the fact as to which the mistake exists is the basis, or vitally affects the basis, upon which the parties contracted (see *Restatement of Contracts*, Section 502, Comments a and e).

The *Restatement of Contracts* illustrates the application of these principles to a release of a personal injury claim as follows (*Restatement of Contracts*, Section 504, Illustration 4):

> "A is injured in an accident negligently caused by B. Immediately after the accident A releases B from all liability for the injury in consideration of $100 paid him. The accident is assumed by both parties to have caused only a slight scalp wound, but proves to have caused permanent spinal disease. The release will be reformed so as to cover only damages for the slight wound that was all that the parties had in mind."

It codifies the principles governing the *quantum* of proof necessary to avoid a release on the grounds of mistake as follows (*Restatement of Contracts*, Section 511):

> "It is essential in order to obtain a decree rescinding or reforming a written conveyance, contract, assignment or discharge for mistake, that the facts necessary for the allowance of the remedy shall be proved by *clear and convincing evidence and not by a mere preponderance.*" (Emphasis supplied.)

Petitioner's assertion that "the Wilcox case is more revered for its antiquity than for its authoritativeness or its scholarliness" (Petitioner's brief, p. 16) cannot be reconciled with the fact that the same rule announced in

that case concerning the type of evidence necessary for avoidance of a release has been adopted by the *Restatement of Contracts*.

Petitioner's contention, in the instant case, was that the release should be avoided because of mutual mistake of fact as to the nature and extent of petitioner's injury. The Circuit Court of Appeals reversed and ordered a new trial because the District Court did not submit this issue to the jury with proper instructions. It cannot be said that this action of the Circuit Court was erroneous unless it is to be concluded that the evidence of mistake was so overwhelming that the District Court was justified in withdrawing the question of fact from the jury and in instructing the jury, *as a matter of law*, that the release was not binding as to any permanent injuries that the petitioner may have suffered. A review of the evidence on the issue of mistake shows that there was an issue of fact for the jury. Indeed, we submit that if any question is to be raised as to the sufficiency of the evidence the question should rather be whether there was enough evidence to support the petitioner's position to warrant the submission of the evidence to the jury. In other words it seems to us that the Trial Court might have been justified in instructing the jury that, as a matter of law, there was no clear and convincing evidence of the alleged mistake of fact, but regardless of whether we are correct in this latter conclusion, the evidence at least raised an issue of fact which the respondent was entitled to have submitted to the jury.

Although petitioner claimed that the reason he executed the release was that he was advised by Mr. Veidt, respondent's claim agent, that there was nothing wrong with him and he could go back to work (R. 27a), petitioner's testimony, taken as a whole, shows that this was not the fact. He testified that his back had pained him terribly for the two-month period from the date of the accident to the time the release was executed (R. 23a), and he stated that, at the very time of the execution of the release, his back pained him so that he could hardly sit on a chair (R. 26a).

In addition to the fact that petitioner's own testimony showed that he had full knowledge of the nature and extent of his injuries, both from the subjective symptoms of pain which he had undergone and from the necessity for treatment to his back, the medical testimony in the case, together with the report of petitioner's doctor furnished to respondent by petitioner (Defendant's Exhibit 3, R. 259a, 274a) showed clearly that, at the time the petitioner executed the release, he was fully aware of the fact that he had a back injury of the very nature described at the time of the trial and for which his claim at the trial was made. Furthermore, as to petitioner's knowledge of his condition, one of the members of his crew testified that on December 20, 1944, only six days after the accident is claimed to have occurred, petitioner complained of torn ligaments in his back (R. 147a), which was the same condition found and described by petitioner's family doctor both before and after the date of execution of the release (R. 124a, 130a).

A comparison of the information contained in Dr. Fair's report (Defendant's Exhibit 3, R. 259a, 274a) and of the testimony of petitioner's family physician, Dr. Sheets, who testified concerning petitioner's condition when he was examined shortly after the accident and prior to the execution of the release (R. 123a-126a), with the testimony of Dr. Sheets (R. 126a-136a) and Dr. Jepson (R. 114a-122a) concerning petitioner's condition at the time of examinations subsequent to the execution of the release and up to the time of the trial, shows that petitioner, at the time he executed the release, had full knowledge, from his own doctors, of the very injuries for which he sought compensation at the time of the trial. A chart or diagram showing, in the first two columns, petitioner's condition as disclosed by Dr. Fair's report and Dr. Sheets' examination before the date of execution of the release and showing, in the next two columns, his condition subsequent to the date of the release and up to the time of trial is attached, on the opposite page, for purposes of comparison. This clearly

	Examinations before execution of release		Examinations after date of release	
Name of Doctor	C. R. Fair (Defendant's Exhibit 3—R. 274a)	R. L. Sheets (first examination—R. 123a-126a)	R. L. Sheets (subsequent examinations—R. 126a-136a)	Paul N. Jepson (R. 114a-122a)
Specialty	Chiropractor	Surgery—plaintiff's family physician (R. 128a)	Surgery—plaintiff's family physician	Orthopedic surgeon
Dates of Examination	15 or 16 times between Dec. 28, 1944 & Feb. 13, 1945 (R. 23a)	Late December 1944	Visits from March 1945 to June 1945 and from Oct. 1945 to date of trial	July 3rd & 5th and Oct. 2, 1945; March 11, 1946 and May 21, 1946
Diagnosis	Nerve pressure and inflammation of sacroiliac and lumbar region of spine	Spasticity of muscle of sacroiliac region Sacroiliac subluxation—torn ligaments	Low back strain known as sacroiliac subluxation—damaged ligaments	Restricted motion of back, muscle spasm, low back strain of chronic nature at the sacroiliac junction, 15% limited motion
Treatment	Chiropractic adjustment to remove pressure	Taped back—rest—anodine for pain	Taped back, applied heat to back, narcotic to relieve pain	Massage, baking, fracture boards
Prognosis	Weakness which is readily increased and makes plaintiff susceptible to recurrence—patient not discharged	None	Condition permanent with 15 to 20% disability	Unable to state whether condition temporary or permanent, but patient predisposed to low back strain
Remarks			Psychogenic change and loss of weight because of fear that back condition is permanent.	Extent of disability, restriction of motion and muscle spasm varied substantially from visit to visit

shows that there was no change in the petitioner's back condition subsequent to the time the release was executed, that petitioner had full knowledge of his injuries at the time the release was executed and that, accordingly, there was no mutual mistake of fact.

Although, at the trial, petitioner made much of the fact that the alleged statements of Mr. Veidt, respondent's claim agent, concerning petitioner's injuries were made after petitioner's back had been X-rayed and before the release was executed (R. 26a, 137a, 138a), petitioner acknowledged that later on the same day, subsequent to his execution of the release, he had stated to respondent's trainmaster that he did not know whether he had any broken bones because no report of the X-ray examination had yet been received (R. 78a, 79a, 137a). Thus it is clear that petitioner did not understand any of the remarks made to him by Mr. Veidt as being based on the X-rays which were taken. Furthermore, at the time of giving that statement, *after* the settlement had been effected, petitioner was uncertain as to whether or not he had any broken bones, although actually he had none (Plaintiff's Exhibit 6, R. 260a, 271a), but he did know from his own doctors and his own senses, as a result of the pain he says he then suffered, that he had an injury in the lower back or sacroiliac region. In other words, at the time the settlement was effected, petitioner was uncertain as to whether or not he had any broken bones, but thought that such a possibility existed. However, he was fully aware of the back strain of which he now complains, and which is the only injury now claimed to have occurred to him. He thus had full knowledge of the injury, the claim for which was released, and there was no mutual mistake of fact.

The transaction is readily understood by an examination of the testimony of respondent's claim agent, Mr. Veidt. He testified that the question of the extent of petitioner's injury was not a material consideration in the set-

tlement and release transaction but that the settlement figure was arrived at and the release executed because, on the petitioner's own version of the accident, the facts did not disclose any liability or negligence of the respondent (R. 248a, 251a, 253a, 256a, 257a). Mr. Veidt denied telling petitioner that there was nothing wrong with him and he could go back to work (R. 249a). Of course, since Mr. Veidt had the doctor's report before him, he knew of petitioner's claimed back injury (R. 249a) but was concerned not with the extent of the injury but with the question of liability. In other words, the nature and extent of petitioner's injury did not, in the language of the *Restatement of Contracts,* Section 502 Comment e, "vitally affect the basis" upon which Mr. Veidt entered into the release transaction, so that, even if there had been any mistake by petitioner as to his injury there was no *mutual* mistake as to a material present fact.

It is submitted that the Circuit Court properly held that a new trial should be granted because of the failure of the Trial Judge to submit to the jury the question of whether or not the release was executed under a mutual mistake of fact. It would seem that the evidence offered on the point was insufficient to satisfy the rule of the Federal decisions requiring clear, unequivocal, and convincing evidence of mistake. Even if it could be contended that respondent was not entitled to binding instructions on the ground that petitioner was barred by the release, still there can be no doubt that respondent was at least entitled to have the jury pass on the issue and on the credibility of petitioner's version of the incident.

Petitioner urges that the decision of the Circuit Court in the instant case is in direct conflict with decisions of the Circuit Court of Appeals for the Second Circuit (Petitioner's brief, pp. 8, 9, 16, 17). This, of course, is in connection with petitioner's suggestion that the Circuit Court granted a new trial because of the failure of the Trial Judge to charge that petitioner had the burden of proving

mistake by "clear, unequivocal, and convincing" evidence as required by the *Wilcox* case. As has already been shown, the error on the basis of which the new trial was granted was not the failure to charge on the burden of proof but the failure to submit to the jury the issue of mistake. However, the cases relied on by petitioner do not reveal any conflict between the *Wilcox* case and the decisions in the Second Circuit, as to the burden of proof.

Petitioner cites the case of *Steele v. Erie R. R.*, 54 F. 2d 688 (W. D. N. Y., 1930), affirmed *per curiam* 54 F. 2d 690 (C. C. A. 2d, 1931), as illustrating the conflict. However, in that case, which was tried without a jury, the Trial Judge specifically found that the release involved was executed under a mutual mistake as to the nature of the injury. The point at issue was whether or not petitioner's mistaken belief that his injury would be cured within several weeks, which belief was based on the *opinion* of his doctor, constituted a mistake of *fact* such as would permit avoidance of a release. On this point alone, the District Court indicated that it would not follow the *Wilcox* case in which it had been held, not only that clear and convincing evidence of mistake must be presented in order to avoid a release, but also that a mistake in estimate of the duration of a disability constitutes a mistake in prophecy or opinion which is insufficient to warrant avoidance of a release on the ground of mutual mistake of *fact*. The District Court in the *Steele v. Erie* case did not in any way intimate disagreement with the requirement of clear and convincing evidence for avoidance of a release. It did indicate its preference for the concurring opinion in the *Wilcox* case, in which opinion Circuit Judge Thayer had disagreed with the majority concerning the difference between opinion and fact, but had stated that (116 Fed. 919):

> "I concur in the view expressed in the foregoing opinion that the evidence which is relied upon by the

complainant below . . . is altogether too uncertain, conflicting, and unsatisfactory to warrant a court in setting aside a release . . . the settlement in question ought not to be annulled, except on *clear proof* that it was obtained either by imposition or fraud, or while the complainant was laboring under some serious mistake of fact, for which the railroad company was in some measure responsible . . . I agree to the reversal of the judgment below on the ground last indicated, namely, that the testimony is insufficient to annul the release on the ground of fraud or mistake, . . ." (Emphasis supplied.)

The opinion of the Circuit Court in the *Steele v. Erie* case was merely a *per curiam* opinion and, since the only issue presented to it was the question of whether or not a mistaken belief as to future disability can be regarded as a mistake of fact, the Circuit Court's opinion cannot be regarded as a holding on the question of the *quantum* of proof necessary for avoidance of a release. The conflict asserted by petitioner is accordingly illusory.

In *Scheer v. Rockne Motors Corp.*, 68 F. 2d 942 (C. C. A. 2d, 1934), also relied on by petitioner, the issue, again, insofar as a release was involved, was whether mistake as to the duration of disability should be regarded as a mistake of fact or as a mere mistake of opinion. On this point the court adopted the reasoning of the concurring opinion in the *Wilcox* case but did not, in the least, indicate any disapproval of the general principle announced in the *Wilcox* case covering the type of proof necessary for avoidance of a release.

Petitioner also relies on the case of *Ricketts v. P. R. R.*, 153 F. 2d, 757 (C. C. A. 2d, 1946). In that case the court's opinion was written by Judge Learned Hand, a concurring opinion was written by Judge Frank, and Judge Swan dissented. Again, however, the issue in the case did not, in any way, involve the *quantum* of proof necessary for avoid-

ance of the release, and the court's opinion dealt with the question of whether a general release could be avoided where it had been executed without having been read by one who acted on the advice of an attorney authorized only to adjust a claim for back wages. Judge Frank wrote a long concurring opinion in which he urged that the existing rule concerning releases in cases arising under the Federal Employers' Liability Act should be abandoned in favor of the rule prevailing in Admiralty cases. Thus his opinion, in effect, is a recognition of the fact that the Circuit Court's opinion in the instant case is in accord with the decisions in other circuits and that petitioner's contention that there is a conflict of decisions on the point is completely without merit. There is no suggestion in Judge Frank's opinion that the question of mistake in the execution of a release should not be submitted to the jury, although he urges that the rule concerning the burden of proof should be changed. Even if, as petitioner contends, the rule of the *Wilcox* case requiring clear, unequivocal, and convincing evidence of fraud or mistake in order to avoid a release should be relaxed, it certainly could not be suggested that the person asserting the release is not entitled to have the jury consider the evidence concerning the issues of fraud or mistake, whether the burden of proof be placed on the person asserting the defense of the release or on the person seeking to avoid it.

Petitioner also contends that this Court, in its decision in the case of *Garrett v. Moore-McCormack* Co., 317 U. S. 239 (1942), indicated that the rule which is applicable in cases involving releases executed by seamen should be applied to cases arising under the Federal Employers' Liability Act. In support of this contention, it relies on footnote 17 to the opinion in the *Garrett* case. In the *Garrett* case, this Court discussed the long-standing solicitude of the courts for seamen and the well recognized rule that, in Admiralty, the burden of sustaining a release executed by a seaman is on the person asserting the release as a de-

fense. It was pointed out that this result follows from the theory that seamen are the wards of the Admiralty courts. Of course, there is no similar doctrine as to railroad employees and the historical justification for the admiralty rule is not applicable to railroad employees. In discussing seamen's releases, this Court mentioned that the adequacy of the consideration and the nature of the medical and legal advice available to seamen at the time of the execution of the release were relevant to an appraisal of the seamen's understanding of the release. In the footnote to this portion of the opinion, mention was made of the "somewhat comparable cases involving releases for personal injuries arising from non-maritime torts," in which connection the cases of *Union Pacific Ry. v. Harris,* 158 U. S. 326 (1895); *Chesapeake & Ohio Ry. v. Howard,* 178 U. S. 153 (1900); and *Texas & Pac. Ry. v. Dashiell,* 198 U. S. 521 (1905), were cited. In connection with petitioner's contention, it is interesting to note that the case of *Texas & Pac. Ry. v. Dashiell, supra,* is the only one of these cases involving a release executed by a railroad employee. In the *Dashiell* case, this Court affirmed a judgment for the plaintiff on the basis of the construction of the language of the release there involved, which was construed as covering only the injuries enumerated in the release and not the plaintiff's impaired mental powers and loss of sight, neither of which was mentioned in the release. The case is clearly not "on 'all fours' " here, as petitioner contends (Petitioner's brief, p. 16) since in the instant case there is no question concerning the meaning of the all-inclusive language of the release, and the issue is simply whether or not the evidence presented by the petitioner was sufficient to warrant avoidance of the release and whether the Trial Judge erred in withdrawing that question from the jury.

Petitioner also urges that the release involved in the instant case is invalid under the provisions of Section 5 of the Federal Employers' Liability Act , 45 U. S. C. A. Sec-

tion 55 (Petitioner's brief, pp. 18-20). This provision of the Act invalidates contracts, the purpose or intent of which is to enable a common carrier to exempt itself from liability created by the Act. In support of this contention, petitioner cites the case of *Duncan v. Thompson*, 315 U. S. 1 (1942), but the decision in that case does not touch on the issue here presented and this Court expressly reserved in that decision the question of whether or not Section 5 places any limitation on the validity of compromises or agreements of settlement of claims arising under the Federal Employers' Liability Act. The language of the Section of the Act relied on by the petitioner indicates quite clearly that settlement and release transactions are not affected by it. Thus the use of the word "exempt" implies an avoidance of all liability or of any payment on account of liability rather than a compromise resulting in a payment to the claimant. The decision in *Duncan v. Thompson, supra,* settled, once and for all, the question of whether or not a contract entered into after the date of injury could constitute a violation of Section 5. However, it did not affect the authority of earlier decisions to the effect that Section 5 does not operate to invalidate compromises and settlements of an employee's claim under the Federal Employers' Liability Act. **Bay State Dredging & Contr. Co. v. Porter, 153 F. 2d 827 (C. C. A. 1st, 1946); Culver v. Kurn, 354 Mo. 1158, 193 S. W. (2d) 602 (1946).** For cases announcing the same rule prior to the decision in *Duncan v. Thompson,* supra, see **Central of Ga. Ry. v. Hoban, 24 Ga. App. 686, 102 S. E. 46 (1920); Patton v. Atchison T. & S. F. Ry., 59 Okla. 155, 158 Pac. 576 (1916); Ballenger v. Southern Ry., 106 S. C. 200, 90 S. E. 1019 (1916).**

As was stated in **Patton v. Atchison T. & S. F. Ry., supra, 59 Okla. 156, 158 Pac. 577:**

> "If the contention of plaintiff that such a settlement is in conflict with the Federal Employers' Lia-

> bility Act be true, every injury to a railroad employee falling within the terms of that act must inevitably be brought to the courts for settlement, for if settlement in the sum of $100 be invalid, one in the sum of $10,000 would be equally so. To hold with the plaintiff would be to preclude the possibility of any settlement between the injured employee and the railroad company out of the courts."

Certainly, had Congress intended to invalidate all settlements of claims arising under the Federal Employers' Liability Act, it would have used language more clearly indicating such a drastic purpose. The construction of Section 5 urged by the petitioner would, it is submitted, be most harmful to railroad employees seeking to compromise legitimate claims and would compel them, in every case, no matter how minor the injuries involved, to resort to the courts.

Petitioner also urges that, since Congress has legislated with respect to seamen's releases in such manner as to indicate that the burden of sustaining those releases is on the employer, the same result should apply as to releases by railroad employees, as to which Congress has not legislated (Petitioner's brief, pp. 20, 21). It is difficult to follow the logic of petitioner's argument in this respect. On the contrary, it would seem that, since Congress has seen fit to legislate concerning seamen's releases but has chosen not to legislate concerning railroad employees' releases, it is the intention of Congress that releases by railroad employees shall be subject to the same rule as are releases in all other situations about which there has been no legislation. Petitioner's argument seems, in effect, to ask this Court to legislate on the subject, the Congress not having done so.

II. The Circuit Court Properly Granted a New Trial Because the Charge of the Trial Judge Improperly Assumed the Existence of a Fact Which, Under the Evidence, Was an Issue for the Jury.

The second reason for the Circuit Court's grant of a new trial was the fact that the Trial Court's instructions with respect to the effect of the release assumed a point which was properly an issue for the jury. The Trial Judge had charged (R. 281a, 282a):

> "Anyhow, they settled to the extent of $250.00, and the release has been offered in evidence and admitted, and *both sides agree that that release was not in contemplation of any sort of permanent injury.*
>
> "Now, members of the jury, you cannot agree to something you don't know anything about and didn't intend to cover. I want to make this statement, and I hope that the defendant will not object to it, because I can't imagine that a responsible and reputable employer, whether individual or corporate, would knowingly, . . . knowingly, . . . commit a fraud on an employee. I think *if it had been known that this man had these permanent injuries* Mr. Veidt would not have handled the matter; it would probably have gone to Chicago where Mr. Callen said he was sent when he couldn't settle for $500.00. Therefore that release was given and taken, and Mr. Callen received $250.00.
>
> • • •
>
> "The release, as I have told the attorneys for both sides, I do not consider binding *insofar as it applies to his permanent injuries, because the Pennsylvania Railroad certainly didn't know he was permanently injured, and if they did know he was permanently injured* and settled for $250.00 the comment of the Court might be entirely different." (Emphasis supplied.)

Thus the instructions assumed, without qualification, that petitioner was permanently injured, and they were duly excepted to by respondent on this point (R. 295a, 296a). The Circuit Court, in discussing this portion of the charge, stated (R. 318):

> "Though the permanency of appellee's injuries was one of the controverted issues both in the pleadings and at the trial, *the District Judge* in his charge *mistakenly advised the jury* in the above noted instructions *that appellee had been permanently injured and that this was conceded by the appellant.* After so doing, the Court said to the jury, 'I am going to leave you to pass judgment upon how far this man had been impaired, whether partially impaired, whether partially impaired permanently or whether he is impaired in his earning capacity at all. I am going to leave that entirely to you. * * * I am going to leave you to say in your experienced judgment just how far he has been impaired.'
>
> "Again, while the Court obviously made a sincere attempt to present to the jury the real status of the permanent injury claim, *we do not think that the rather vague language used actually eliminated the harm of the previous positive statements.* The amount paid in settlement had been $250. The verdict was in the sum of $24,990. The wide disparity between the two figures may or may not be some indication that the jury did not understand that the Trial Judge meant to contradict what he had said at least three times in the same charge. In any event it does seem that *the Court's final instruction regarding the injuries was hardly sufficient to fully counteract the unfair result of the inadvertent misstatements of appellant's position in this respect.*" (Emphasis supplied.)

An instruction is improper which assumes the existence of a fact which, under the evidence, is an issue for the jury.

Reading Company v. Larkin, 114 F. (2d) 416, 420 (C. C. A. 3rd), cert. den. 311 U. S. 707 (1940); Carpenter v. Connecticut General Life Insurance Company, 68 F. (2d) 69 (C. C. A. 10th, 1933). Whether or not petitioner's injuries were permanent was an issue raised both in the pleadings (R. 4a-8a) and in the evidence. Dr. Jepson, who testified for the petitioner, stated that he could not say whether or not the injury was permanent, and further stated that petitioner's youth enhanced his chances of recovery (R. 117a). Respondent at no time conceded that petitioner's injuries were or are permanent.[1] Thus the assumptions made by the Court that petitioner did, in fact, have permanent injuries and that the release was not intended to cover such injuries, was improper and highly prejudicial. Whether or not the petitioner was permanently injured was clearly for the jury to determine, both in deciding whether or not the release was executed under a mutual mistake of fact and in passing on the amount of petitioner's recovery, if any.

Petitioner asserts that the Trial Judge's charge in this respect is correct under the decision in the case of *Texas & Pac. Ry. v. Dashiell, supra,* 198 U. S. 521. However, as has already been pointed out, that case involved the construction of the language of a release, which language was construed, both by the Trial Court and this Court, as not

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[1] Apparently, the Trial Judge misunderstood the testimony of respondent's claim agent, Mr. Veidt. In qualifying respondent's sixth point for charge, the Trial Judge stated: "Mr. Veidt said he didn't know he was permanently injured, ..." (R. 289a). Veidt did not testify that at the time of the execution of the release "he didn't know he (petitioner) was permanently injured." What Veidt testified was that when the release was executed he did not know that the petitioner was suffering from the injuries that petitioner's witnesses had described during the trial of the case (R. 256a). This was not an admission that the injuries were permanent, since the doctors testifying for petitioner at the trial had disagreed as to whether or not the injuries were permanent.

including or covering the injuries complained of in that suit. There is no suggestion that the terms of the release here did not cover all injuries, whether temporary or permanent, so that the *Dashiell* case is not in point. Since petitioner's own expert witness, Dr. Jepson, described by the petitioner as a "famed Philadelphia orthopaedic specialist" (Petitioner's brief, p. 7) was unwilling to testify that the petitioner's injuries were permanent (R. 117a, 118a), it is clear that the statement that both sides agreed that the injuries were permanent was most prejudicial to the respondent's case and, as was suggested by the Circuit Court, may be the explanation for the large verdict which was rendered (R. 318).

III. The Circuit Court Properly Granted a New Trial Because of Errors in the Charge of the Trial Court Which Were Duly Raised at the Trial and on Appeal.

Petitioner urges that the Circuit Court granted a new trial on a ground not raised by the respondent, either at the trial or on the appeal (Petitioner's brief, pp. 7, 8, 10, 11, 13). His argument on this point is not sustained by the record, and is based on a misconception of the grounds of the decision of the Circuit Court of Appeals.

As is pointed out in the opinion of the Circuit Court (R. 315-318), the Trial Judge, in his charge, advised the jury that the release was not binding as to permanent injuries and, in addition, stated that "both sides agree that the release was not in contemplation of any sort of permanent injury" (R. 281a). The points for charge submitted by the respondent in connection with the release were all predicated on the proposition that it was for the *jury* to decide the issue of whether or not the release should be avoided because of mistake or fraud (Respondent's points for charge Nos. 4, 5, 6, 7 and 8—R. 299a, 300a). Thus, in submitting its points for charge, respondent's position was made entirely clear, and the charge given by the

judge was completely inconsistent with the points requested by the respondent.

At the conclusion of his charge, the Trial Judge read and affirmed the inconsistent points for charge, qualifying, however, the sixth point, which was directly related to the respondent's contention concerning the release (R. 289a). The sixth point for charge was to the effect that, if the petitioner had been advised that he had not been cured at the time he executed the release and that further treatments would be required, then the release was binding on the petitioner and the jury's verdict must be for the respondent (R. 300a). The evidence showed that, several months prior to the time when the release transaction was entered into, petitioner had been examined by Dr. Sheets, his family physician, whose examination at that time showed the same condition complained of at the trial (R. 124a-128a), and had received a report from the doctor who was treating him (dated the day previous to the day on which the release was executed) showing that the petitioner was not discharged, was suffering from nerve pressure and inflammation in the sacroiliac and lower lumbar region of the spine and had a weakness which was susceptible to recurrence (Defendant's Exhibit 3, R. 259a, 274a). This was the evidence covered by respondent's sixth point. The court, however, qualified that point with the following statement (R. 289a):

> "Members of the jury, I affirm that point with this explanation, if you believe that at the time the plaintiff executed the release *he had been advised by his own doctor that he had not been cured and that he believed he had not been cured—I don't know what evidence there is,* I will leave that entirely to you, as to what the doctors have advised this man at the time he consulted with Mr. Veidt, that he had not been cured. But, *he did state he didn't know he was permanently injured, and Mr. Veidt said he didn't know he was permanently injured,* and they both settled on the basis of

loss of wages and expenses and because Mr. Veidt felt there was no liability and that it was just a local matter. With that explanation, I affirm that point. *If he believed and he knew full well he was injured the way he is today* and he made a settlement for $250.00, *then he would be bound by it.*" (Emphasis supplied.)

Thus, even if it could be contended that the affirmance of respondent's points for charge would have cured the errors committed in the charge, namely the failure to submit the questions of the permanence of the injury and of mistake as to the release to the jury, it is clear that the qualification of the sixth point for charge did not properly present the release question to the jury. The Court's comments carried the implication that there was no evidence that petitioner had been advised by his own doctor that he had not been cured, although the evidence on this point was contained in a report from petitioner's doctor which he testified he had obtained and brought to respondent's claim agent (R. 60a, 61a). The court's comments mistakenly referred to Mr. Veidt as having testified that "he didn't know he (petitioner) was permanently injured", whereas Mr. Veidt had merely stated that "I didn't know he had the injuries the doctors described in this court room" (R. 256a) and the doctors, in their testimony, had disagreed as to whether or not the injuries were permanent. Furthermore, the court's qualification of the point was, in effect, a statement that, unless, at the time the release was executed, petitioner believed he had not been cured and believed he had the very injury described at the trial (regardless of the advice shown to have been given to him by his own doctor), the release should be avoided. This was an erroneous statement of the law, in that it suggested that testimony as to petitioner's subjective belief concerning the nature of his injury could be accepted by the jury as a sufficient ground for avoidance of the release, although contradicted by the written report of his own doctor which had been obtained

by petitioner before the release was executed. Respondent duly excepted to the qualification of this point for charge (R. 293a) so that the question was properly raised at the trial and consequently was available to the respondent in connection with the appeal to the Circuit Court.

Rules 46 and 51 of the Rules of Civil Procedure for the District Courts of the United States make it clear that the policy of the rules is merely that the Trial Court be apprised of the action which any party desires the court to take, and the grounds therefor. It cannot be doubted that respondent, both in its requests in the points for charge and in the exceptions taken to the Trial Judge's charge, made it clear to the Trial Court that it desired to have the issue concerning the effect of the release submitted to the jury, under proper instructions. Respondent's motion for a new trial assigned as error the court's instructions concerning the effect of the release (R. 305a). The same question was raised in respondent's statement of points on which it intended to rely on appeal, and respondent's brief in the Circuit Court raised, as the first question involved (Appellant's brief below, p. 1), the propriety of the charge concerning the release, the major part of respondent's argument in the Circuit Court being devoted to this point (Appellant's brief below, pp. 6-16). As has been shown, the grant of a new trial by the Circuit Court was based, mainly, on the failure of the Trial Judge to submit to the jury the issue of mistake in the execution of the release (R. 317). This question was duly raised by the respondent, both before the Trial Court and on appeal.

It is an over-simplification of the Circuit Court's opinion to contend, as the petitioner does, that the sole basis for the decision was the erroneous charge as to the effect of the release (Petitioner's brief, pp. 3, 4, 7, 10, 25, 26). As is pointed out in the Circuit Court's opinion (R. 318), the Trial Judge mistakenly advised the jury that petitioner had been permanently injured and that respondent conceded this fact. The Circuit Court considered another por-

tion of the charge which was claimed by petitioner to have corrected the error and then stated (R. 318):

> "In any event it does seem that the court's final instruction regarding the injury was hardly sufficient to fully counteract the unfair result of the inadvertent misstatements of appellant's position in this respect."

Thus the grant of a new trial by the Circuit Court was occasioned not only by errors concerning the release but by the misstatement of respondent's position regarding the permanence of the injury, which misstatement was duly excepted to be the respondent at the trial (R. 295a, 296a), was included in the sixth reason for a new trial in respondent's motion for a new trial (R. 305a), was included as one of the questions involved in appellant's brief in the Circuit Court (Appellant's brief below, p. 1) and was argued both in the briefs and at the oral argument before the Circuit Court (Appellant's brief below, pp. 16, 17).

Even if it could be contended that the grant of a new trial by the Circuit Court was not based on errors duly raised by exceptions at the trial, it is clear that the Circuit Court has power to direct a new trial for fundamental errors and to prevent a miscarriage of justice, although the errors were not properly raised in the Lower Court. **Sibbach v. Wilson & Co., 312 U. S. 1 (1941); Hormel v. Helvering, 312 U. S. 552 (1941); Shokuwan Shimabukuro v. Higeyoshi Nagayama, 140 F. 2d 13 (Ct. App. D. C. 1944).** Thus if there had been no exceptions whatever supporting the questions argued before the Circuit Court in this case, the great confusion resulting from the misstatements and contradictions in the charge would have fully justified any court in directing a new trial.

IV. A New Trial Should Have Been Granted Because the Charge Was Unduly Prejudicial to the Respondent and Unduly Favorable to the Petitioner and Because the Trial Court Erred in Refusing to Withdraw a Juror at Respondent's Request.

At the conclusion of the Trial Judge's charge, respondent excepted to the charge as being unduly favorable to the petitioner, emphasizing the petitioner's case and being prejudicial to the respondent (R. 297a). A careful reading of the entire charge shows the merit of this exception. In this connection the portions of the charge already discussed concerning the effect of the release and the permanence of the injury should, of course, be considered. In addition, there were other salient features of the charge which require comment. Although it may well be that no one of the portions of the charge to be discussed, standing by itself and considered alone, would constitute prejudicial error, it is submitted that the cumulative effect of all of these errors was to prejudice the respondent and to deprive it of a fair trial.

One of these errors was the misstatement in the charge that, at the time of the coupling when petitioner claimed to have received his injury, the regular engineer had testified that he braced himself expecting a possible jar (R. 279a). Examination of the testimony of the regular engineer, Mr. Hirschmann, fails to reveal any such statement. On the contrary, his testimony was as follows (R. 219a):

> "Q. Do you remember anything about the coupling that was made when you coupled to the other cars?
>
> "A. I was standing right in the middle of the deck. The pilot was going very slow, and I was standing there, and I figured we might be close to the cars, and I was waiting for them to stop, or whatever was going on, and when he stopped I said to him, 'Did you make it?' just like that,—I didn't feel any jar of any kind, and then I proceeded pulling more clinkers.

"Q. Would you say anybody on the engine was jostled, or anything?

"A. I know I wasn't. I was standing right in the middle with the hook, and if it had hit hard I would have went one way or the other, off balance."

Thus, the gist of the engineer's testimony was not that he braced himself for the coupling but rather that he was standing in an insecure and unbraced position, so that if a hard coupling had been made he would have been thrown off balance. The Court's attention was called to this misquotation of testimony at the conclusion of the charge (R. 295a), but the charge was not corrected. Certainly, where the question of negligence depended solely on whether or not the coupling operation was effected at a high rate of speed, the misquotation of testimony having a direct bearing on the point constitutes a proper basis for the granting of a new trial.

Another error was the statement by the Trial Judge that the petitioner had been an employee of the respondent for sixteen years (R. 279a). This was an error, since, in point of fact, the petitioner had been employed by the respondent for less than three years (R. 13a). The length of time petitioner had worked for respondent was not relevant to any issue in the case and the erroneous statement of the Trial Judge was prejudicial to the respondent in that it tended to excite sympathy for the petitioner, particularly with regard to the question of whether or not petitioner had been imposed upon in connection with the release.

In discussing the question of contributory negligence, the Lower Court stated (R. 283a):

"The company *is not free from liability* but if he contributed to it himself, why, then, any amount that would otherwise be awarded, would be diminished accordingly." (Emphasis supplied.)

The statement that "the company is not free from liability" was certainly most misleading to the jury. Liability was

never conceded by the respondent. The quoted portion of the charge was tantamount to the giving of binding instructions on the question of respondent's liability, leaving for the jury's determination only the questions of contributory negligence and amount of recovery. The record in this case is devoid of any justification for such an instruction.

One instance of the same type which occurred during the course of the trial should also be considered since it, as well as the objectionable portions of the charge itself, tended to confuse the jury and distort the issues in the case.

During the testimony of respondent's conductor, C. E. Crum, he was asked by the court whether or not it was good railroading for a brakeman to ride on the stirrup (or step) of a tender when running against traffic, and his reply was that with a light engine and a tank (or tender) it was not good railroading (R. 165a, 166a). The court then remarked (R. 166a):

> *"I don't know how the passengers would feel. I think we would feel more secure if they followed the other method.* If you disagree, we will have the jury take both phases of it." (Emphasis supplied.)

The court's remark was objected to for the reason that there was no question of passengers in the instant case and that, obviously, passengers could have nothing to do with the movement of a "light" freight engine. In response to respondent's objection, the court aggravated the situation by saying (R. 167a):

> ". . . *I say that passengers might have a very different idea whether or not, in the interest of safety, that was or was not good railroading.*" (Emphasis supplied.)

When the question of passenger safety was again injected into the case by the court, respondent moved for the withdrawal of a juror. The motion was declined.

The court's comments concerning the safety of passengers and what passengers might think of the matter were most uncalled for. Petitioner was a brakeman on a freight train and, according to his testimony, was injured in the course of a coupling operation between a freight engine and tender and some freight cars. No passenger train was involved and the Trial Judge's comments concerning passengers were completely unrelated to the issues in the case. Naturally, the Judge's remarks tended to confuse the issue in the minds of the jury since they indicated that a question of passenger safety was involved and hence invited the jury to view the transaction, not impartially, but as if they were passengers on a train near the scene of the accident. Moreover, the suggestion of what passengers might think of the practice was an invitation to the jury to give consideration to lay opinion on a technical matter of railroad operation, and since a "passenger" could not have been called as a witness to express his opinion on this subject, speculation as to what such opinion might be was highly improper. It is accordingly submitted that the court abused its discretion in not withdrawing a juror as requested.

In describing the accident the court in its charge said (R. 276a):

> "There were 80 cars in this train, which was being pulled by one of the largest engines of the Pennsylvania Railroad, and that means one of the largest engines in the country, because the Pennsylvania Railroad is up to date and progressive in its equipment and everything that goes to make *one of the most successful railroads in the world.*" (Emphasis supplied.)

The remarks concerning the Pennsylvania Railroad, although complimentary, were completely unrelated to the issues in the case and served only to suggest its wealth

and ability to pay a large verdict. Cf. **New York Central Railroad Company v. Johnson, 279 U. S. 310, 319 (1929); London Guarantee and Accident Company v. Woelfle, 83 F. (2d) 325, 340 (C. C. A. 8th, 1936).**

The Trial Judge, in discussing petitioner's testimony, stated (R. 277a):

> "He took this witness stand and *laid his hand on the Book,* and he told you who he was, what he was, and his version of this occurrence. You watched him, and I watched him. Now then, in your opinion, was he telling the truth from his viewpoint as far as he was able to tell, bearing in mind all these elements that I referred to, was he telling the substantial truth or was he manufacturing something out of the whole cloth? Because, members of the jury, *if he came here and put his hand on that Book and deliberately told you of an incident that never happened,* then there is nothing in this case and you need not worry any about it." (Emphasis supplied.)

There was virtually no discussion, in the charge, of the testimony of any of respondent's witnesses, so that the Trial Judge did not allude to the fact that respondent's witnesses had, similarly, placed their hands on the Book. The emphasis on the fact that petitioner placed his hand on the Book stressed unduly petitioner's version of the accident and tended to distract the jury from careful consideration of the differences between the testimony of the petitioner and the testimony of respondent's witnesses. Although, in response to an exception by the respondent to this portion of the charge, (R. 293a) the Trial Judge pointed out that all of the witnesses had taken the same oath, it is submitted that the effect of the initial emphasis on petitioner's placing his hand on the Book could not be overcome in such manner in response to exceptions by counsel.

In the same vein, the Court said (R. 282a), in commenting on the testimony of the petitioner and his doctors concerning petitioner's injuries:

> "You heard this statement, and *he was put under cross-examination;* he told you the kind of work that he can do and can't do, and the doctors have testified, and you know all about that more than anybody can tell you; *neither side can tell you any more than they have done.*" (Emphasis supplied.)

Although the meaning of this statement is not entirely clear, it places undue emphasis on the fact that petitioner was subject to cross-examination, thus seeming to imply that his testimony in this regard was entitled to great weight; and in stating that neither side could tell more than petitioner's doctors and the petitioner had told, the testimony of petitioner and his witnesses was singled out and emphasized as if it were unimpeachable, whereas there was nothing in the evidence to warrant a statement or assumption that nothing more (or nothing more accurate) could have been presented to the jury by the petitioner.

In several portions of the charge the Trial Judge stressed the fact that the operation of dividing the train into two parts was an unusual occurrence (R. 276a, 277a) although petitioner claimed to have received his injury, not because of such occurrence, but merely because, in the ordinary and simple operation of coupling a tender to some standing cars, the tender and its engine approached the cars at too high a speed. He further commented concerning the hazards of petitioner's occupation in a manner which, it is submitted, had a tendency to excite the sympathy of the jury. Thus he stated, in describing the work of petitioner and his fellow employees (R. 277a):

> ". . . *they risk their lives day and night* and the *common hazard* or the common cause tends to bring them somewhat together. *They are out on the firing line* . . ." (Emphasis supplied.)

Other portions of the charge again alluded to the hazards of petitioner's occupation (R. 278a, 284a). These comments were, it is submitted, unnecessary and unwarranted and served only to excite sympathy for the petitioner.

In commenting on the question of the release, the Trial Judge said (R. 281a):

> "I want to make this statement, and I hope that the defendant will not object to it because *I can't imagine that a responsible and reputable employer,* whether individual or corporate, *would knowingly—knowingly—commit a fraud on an employee.*" (Emphasis supplied.)

This portion of the charge was duly excepted to by the respondent (R. 296a), but it was not corrected. It had not been contended by the petitioner that the release was obtained by fraud and, as even the Trial Judge recognized in his opinion dismissing respondent's motion for new trial (R. 310a), there was no evidence of fraud and the issue of fraud was not raised by the pleadings.[2] Thus the court's remarks were not called for in connection with any issue in the case. It is respectfully submitted that the court's comment concerning fraud was not only unjustified but was inflammatory and highly prejudicial to the respondent.

The court also said, in discussing the release (R. 282a):

> ". . . and if they did know he was permanently injured and settled for $250.00 *the comment of the Court might be entirely different.*" (Emphasis supplied.)

Certainly the implication of this remark was most unfavorable and prejudicial to the respondent and was, furthermore, in complete disregard of the testimony of Mr.

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[2] The suggestion of fraud, at page 25 of petitioner's brief, is likewise most improper and uncalled for, since the issue of fraud was not presented by the pleadings or the evidence and was not even suggested by the petitioner, at the trial.

Veidt to the effect that the settlement figure was based not on the nature of petitioner's injuries, but on the fact that petitioner's own statement concerning the accident showed no liability on respondent's part (R. 248a, 251a, 253a, 256a, 257a). In such a case it would be entirely proper to effect a settlement for a small amount, no matter what the injuries were.

In addition to the portions of the charge discussed above, which were objectionable for the reasons already stated, it is submitted that an examination of the charge as a whole reveals that it gave undue prominence to petitioner's testimony, both as to how the accident occurred and as to how the release was executed, whereas virtually no reference was made to the testimony of respondent's witnesses either as to how the accident happened or as to the release. It seems most probable that the distorted emphasis in the charge indicated to the jury that the petitioner's testimony should be accepted and the testimony of the respondent rejected so that a verdict should be returned for the petitioner.

Although the Circuit Court stated, in its opinion, that it did not find any "substantial error" in connection with these points, it appears probable that the cumulative effect of the errors in the charge which have been referred to, and the refusal to withdraw a juror as requested, together with the errors in the charge concerning the release and the permanency of the injury, serve to explain the unusually high verdict which was rendered, as well as the fact that a verdict was rendered for the petitioner rather than for the respondent.

It is submitted that the prejudicial nature of the charge and the refusal to withdraw a juror were of such importance and gravity as to warrant the granting of a new trial. These points having been raised on the appeal to the Circuit Court are, of course, still open to the respondent in this court without a cross-petition for certiorari. **Langnes v. Green, 282 U. S. 531, 534-539 (1931); Walling v. General Industries Co., 330 U. S. 545, 547 (1947).**

CONCLUSION.

It is submitted that the grant of a new trial by the Circuit Court, in the instant case, should be affirmed for the reasons stated by that court, namely the failure to submit to the jury the issue of mistake in the execution of the release and the erroneous assumption in the charge that petitioner's injuries were permanent; the grant of a new trial should also be affirmed because the charge was unduly favorable to the petitioner and prejudicial to the respondent, and because of the Trial Court's refusal to withdraw a juror on respondent's request.

Respectfully submitted,

PHILIP PRICE,
HUGH B. COX,
Attorneys for Respondent.

IN THE

Supreme Court of the United States

October Term, 1947. No. 331

RUDY E. CALLEN,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF ON BEHALF OF UNITED RAILROAD WORKERS OF AMERICA, C. I. O.

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PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF ON BEHALF OF UNITED RAILROAD WORKERS OF AMERICA, C. I. O.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of the United Railroad Workers of America, C. I. O., respectfully represents:

The United Railroad Workers of America, C. I. O., here begs leave to intervene and file a brief, amicus curiae, because of the immense importance of the issue involved.

Personal injury cases are not usually the subject matter directly considered in contracts of employment negotiated

between the employer and a union on behalf of all the employees. Questions, such as wages, hours of employment, working conditions, and other normally associated problems, are discussed and bargained about, and contracts are executed that assure fair, reasonable and uniform treatment. Personal injuries sustained by employees are not, and realistically cannot be, the subject matter of labor contracts. The variations in type of the injuries, the extent and the period of disability, the uniqueness of the injury as it affects the individual employee and his physical and psychical reaction thereto, his own financial resources upon which he needs to rely during the long period of enforced unemployment due to his disability and the resultant inability to resist the tempting, but small and totally inadequate sum offered in payment of the injury,—all combine to render useless any attempt to make personal injury matters a subject of contract negotiations.

In recognition of these difficulties, practically all of the states have workmen's compensation laws which set up a sum certain per week for disabilities occurring as a result of the employment.

Railroad employees in interstate commerce do not come under these state compensation acts. The remedies and measure of damages under the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq., are never positive, never liquidated, and not possibly the subject of pre-determination. The Federal Employers' Liability Act, like all laws, can be only as effective as its enforcement and its practical application.

However deserving the case, the railroad can, if it desires, sit back and refuse to negotiate a settlement or pay a dollar until a final, unappealable judgment has been obtained in the appellate courts. This means that a railroad family, in which the breadwinner has been disabled or killed, may be without any means of support for two or three years until the successful termination of the litigation. This creates a *practical problem* intrinsically inherent in the problem of

law here at hand. It requires a practical approach and decision.

After a few months, or even a few weeks, of unemployment, the economic strain is so great on the injured that he is ready to take any amount of cash that will pay his immediate bills. That was the situation in the instant case. The employee was already $500 behind in wages. There was no money with which to buy groceries. A new baby was momentarily expected. A paltry $250 was accepted in settlement and a full and final release executed on the blithe assurances of a trained and hardened claim agent that the employee's injuries were but temporary and that the employee could immediately return to work.

The average employee is an honest, sincere individual who wants to work to earn his livelihood and support himself and family. He doesn't want to get hurt, and if hurt, he wants to get better as soon as possible and get back on the payroll as quickly as possible. The railroader wants to retain his seniority to assure his position on the payroll. *He wants to believe his injuries are slight and that he can shortly return to work.*

It is on this class of case, where the injury is not an amputation or one rendered visible by X-ray, that the claim agent thrives. The employee with the ligamenture or musculature of the back disarranged, or with a serious post-concussional syndrome without a fracture of the skull, is the employee most likely not to recognize the seriousness of his injury and most likely to be imposed upon. That is this case.

The employee must be protected against himself,—against his willingness to gamble on future recovery and his very earning capacity.

There is at least as great an inequality in bargaining power between the average injured employee and the large railroad in negotiating a settlement for those injuries; as there was in the ordinary labor cases which called forth the opinions of Chief Justice Taft in AMERICAN STEEL FOUNDRIES v. TRI-CITY CENTRAL TRADES

COUNCIL, 257 U. S. 184, 209; or of Chief Justice Hughes in N. L. R. B. v. JONES and LAUGHLIN STEEL CORP., 301 U. S. 1, 33, and in AMALGAMATED UTILITY WORKERS v. CONSOLIDATED EDISON CO., 309 U. S. 261, 263, 264.

The same inequality in bargaining in seamen's personal injury cases that brought forth the opinions of Mr. Justice Story in HOLDEN v. HARDY, 169 U. S. 366, 397, and Mr. Justice Black in GARRETT v. MOORE-McCORMACK CO., 317 U. S. 239, 248, should provoke a like ruling and opinion in railroad cases.

A classic concurring opinion by Judge Frank in RICKETTS v. P. R. R., 153 F. 2d 757, 760, so holds.

The rationale followed in the HOLDEN and GARRETT cases, supra, commands the same conclusions in these railroad cases. So, in a note, 5 Univ. of Chic. L. Rev. (1938), 446, we find the writer suggesting:

> "But it is believed that in many cases the individual tort claimant being solicited to release his claims is not in a position to defend his own interests even in the absence of coercive or fraudulent conduct on the part of his obligor, especially where that obligor is a powerful business organization, such as a railroad or insurance company. The prospect of a long and costly legal battle with such an opponent, often commanding almost unlimited resources, is enough to deter all but the most courageous or the most vindictive from taking action, especially where a tempting compromise settlement is offered in consideration of a release. It is conceivable that relief might be obtained in equity where gross inadequacy of benefits received or other circumstances render the agreement so unconscionable as to warrant equitable action."

We ask that the burden of establishing the validity of a release taken from a railroad employee under the Federal

Employers' Liability Act be placed on the railroad, and that, where but a nominal sum has been paid, which is less than or even equal to only the wages lost, that fact of itself be held to be evidence of at least a mistake of fact, if not presumed fraud, since the railroad possesses superior facilities for determining the extent of the injuries. *They never over-pay.*

All we are asking is that, in cases where the employee has executed a full release for a nominal sum, the release be held to be payment *pro tanto* only, and not a deterrent to the recovery of a sum within the range expressed by the measure of damages set forth in the Statute.

American railroads will not, by such a ruling, be unfairly deprived of anything they are entitled to. They will merely not be permitted to have unjust enrichment at the expense of the suffering of injured railroaders and their widows and orphans who have been imposed upon by claim agents who obtained releases for pitifully small sums.

In this case, this railroad unblushingly seeks to settle a $25,000 injury judgment for $250. It offered no medical testimony to deny the extent of this man's injuries, although it had had him examined. This disparity speaks for itself and, we respectfully submit, calls for reversal of the principle of law which the United States Circuit Court of Appeals (3rd) dug up of its *own accord,* and upon which it rested its order setting aside the judgment and grant of a new trial to the railroad. In the meantime, a crippled employee, his wife and three children literally starve while awaiting the harassment and tribulations of a new trial.

The recrudescence of this doctrine of release law by the Court below (the first of its kind in railroad employee injury cases) is indeed a far cry from the things said and done by Congress in 1908 when it added Section 5 to the Federal Employers' Liability Act, which all American Railroad Labor thought would prevent the unfair and inequi-

table result now reached below. We urge that certiorari be granted.

Respectfully submitted,

LEE PRESSMAN,
FRANK DONNER,
Counsel for United Railroad Workers of America, C. I. O., Amicus Curiae.

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SUPREME COURT OF THE UNITED STATES

No. 331.—October Term, 1947.

Rudy E. Callen, Petitioner, v. Pennsylvania Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 12, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

Plaintiff, a railroad brakeman, brought this action under the Federal Employers' Liability Act, 35 Stat. 65; 53 Stat. 1404; 45 U. S. C. § 51. He recovered a jury verdict of $24,990, but the Circuit Court of Appeals reversed because of errors in the charge by the District Judge and ordered a new trial. The plaintiff's claim as submitted to the jury was negligence on the part of an engineer in effecting a coupling operation at a speed which plaintiff thought would jolt him off the stirrup of the car he was riding. In jumping for safety, he claimed to have received a severe and permanent back injury. The defendant denied the occurrence, offered testimony that plaintiff did not work at the time in question and also evidence of his admission that he did not work on that day but instead shoveled snow to get his car out of the garage. It also was testified that he had told his conductor he hurt his back on a different occasion. But if the injury was sustained at the time and place alleged, the defendant denied negligence, claimed contributory negligence and pleaded a general release. The controversy here concerns the release.

It was proved and not denied that for a consideration of $250 the plaintiff executed a general release of "all claims and demands which I have or can or may have against the said Pennsylvania Railroad Co. for or by reason of personal injuries sustained by me" at the time

and place involved in the suit. It also released claims for loss of time and expense, and recited that the payment was in compromise and not an admission of liability, that plaintiff read and understood the agreement and that the sum of money stated therein is all that he was to receive.

On the trial, the plaintiff testified that he read and understood the release, knew what he was doing, and intended to waive any further claim, and that when he began talking settlement he said he should have between $300 and $350. No fraud was alleged, but the plaintiff testified that he executed the release in reliance on the claim agent's assurance that "there was nothing wrong" and that he "could get back to the job."

At the trial, plaintiff offered evidence from which the jury might well find that he had a permanent and serious injury. The claim agent admitted that at the time of settlement he did not know the plaintiff was suffering the injury which the doctors at the trial described. The plaintiff had gone to a family physician who taped his back and to a chiropractor whose report plaintiff took with him to the claim agent. It did not diagnose permanent injury but did suggest a weakness making him more susceptible to recurrence. The Railroad procured no medical examination of plaintiff. The claim agent's testimony was that he determined the amount of the settlement on the basis of his belief that there was no liability.

Instructing the jury, the trial court stated:

> "Anyhow, they settled to the extent of $250.00 and the release has been offered in evidence and admitted, and both sides agree that the release was not in contemplation of any sort of permanent injury.
>
> . . . . . .
>
> "Now, I am going to consider that release as binding to the amount of $250.00, and if you find a verdict

for the plaintiff you will deduct that from any amount you would otherwise give him. The $250.00 he got for expenses and medical bills and services that he obtained up to that time; and if you find that he is entitled to a verdict at your hands I will ask you to deduct that $250.00 from any amount you otherwise would award him, because that is what he agreed to take toward that particular phase of his claim, and of course he would not and does not ask, as I understand it, to be excused from that,—he admits that he got it, and there it is.

"The release, as I have told the attorneys for both sides, I do not consider binding insofar as it applies to his permanent injuries, because the Pennsylvania Railroad certainly didn't know he was permanently injured . . . ."

The Circuit Court of Appeals, quite rightly we think, construed the charge of the District Judge as withdrawing the question of validity of the release from the jury and said: "This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries."

An examination of the record at the trial makes it clear that the issue was raised and sharply litigated as to whether the injury, if received by plaintiff in the manner alleged, was permanent in character. Only when and if this issue was resolved in favor of one party or the other could it be known whether there was a basis for finding a mutual mistake or any mistake of fact in executing the release. The court, however, resolved the issue of permanence of injury against the defendant, at least so far as the release was concerned, and on that basis withdrew consideration of that issue from the jury. Even if the issue of permanence were resolved against the defendant, an issue still existed as to validity of the release

since the defendant insists that it did not act from mistake as to the nature and extent of the injuries but entered into the release for the small consideration involved because, upon the evidence in its hands at the time, no liability was indicated. We think the defendant was entitled to argue these contentions to the jury and to have them submitted under proper instructions.

It is apparent that the jury accepted the instructions of the court on the subject of the release. Returning, they rendered a verdict "for the plaintiff, and assess the damages of $25,240.00, of which the Railroad is to be reimbursed with $250.00." The court, saying he wanted to make the record right, asked the jury if that made a net finding of $24,990, which the foreman said they did. Under the instructions they had received, there was little else that the jury could do, for the court had withdrawn from them the issue as to the validity of the release and consequently had given them no instructions as to the law that should govern the determination of any such question.

While the trial court assumed a finding of permanency as a basis for his setting aside of the release, after challenge to his assumption as to the nature of the injuries he made every effort to correct the impression, insofar as it affected the issue of damages. But the trial court did not correct or in any way alter his determination that the release was not binding insofar as it rested on the assumption of permanent injury. The Court of Appeals was right in holding that failure to submit this latter question to the jury was reversible error.

We are urged, however, to decide in this case that the release was properly disregarded by the trial court upon the ground that the burden should not be on one who attacks a release, to show grounds of mutual mistake or fraud, but should rest upon the one who pleads such a contract, to prove the absence of those grounds. It

is not contended that this is or ever has been the law; rather, it is contended that it should be the law, at least as to railroad cases. The *amicus* brief puts it that "We ask that the burden of establishing the validity of a release taken from a railroad employe under the Federal Employers' Liability Act be placed on the railroad. And that where but a nominal sum has been paid which is less than or even equal to only the wages lost, that fact of itself be held to be evidence of at least a mistake of facts, if not presumed fraud, since the railroad possesses superior facilities for determining the extent of injuries . . . ." Considerable reliance is placed upon a concurring opinion in the Court of Appeals for the Second Circuit in *Ricketts* v. *Pennsylvania R. Co.*, 153 F. 2d 757, 760. However persuasive the arguments there stated may be that inequality of bargaining power might well justify a change in the law, they are also a frank recognition that the Congress has made no such change. An amendment of this character is for the Congress to consider rather than for the courts to introduce. If the Congress were to adopt a policy depriving settlements of litigation of their *prima facie* validity, it might also make compensation for injuries more certain and the amounts thereof less speculative. But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.

The plaintiff has also contended that this release violates § 5 of the Federal Employers' Liability Act which provides that any contract to enable any common carrier to "exempt itself from any liability created by this chapter shall to that extent be void." 35 Stat. 66, 45 U. S. C. § 55. It is obvious that a release is not a device to

exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Since we believe the Court of Appeals was right in directing a new trial at which the jury shall be permitted to pass on all issues of fact, the judgment is

Affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE, being of the view that releases under the Federal Employers' Liability Act should be governed by the same rule which applies to releases by seamen in admiralty (see the separate opinion of Judge Jerome Frank, *Ricketts* v. *Pennsylvania R. Co.*, 153 F. 2d 757, 767–770), dissent from an affirmance of the judgment.